

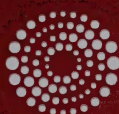
WASHINGTON
PRACTICE

PATTERN JURY
INSTRUCTIONS
CIVIL

Seventh Edition

2022 SUPPLEMENT
TO
VOLUME 6

ISSUED IN APRIL 2022



THOMSON
REUTERS

This Volume Contains No Pocket Part

Refer to
Separate
Soft Bound Supplement
to this Volume
for
Latest Updating Material

WASHINGTON PRACTICE SERIES™

Volume 6

Washington Pattern Jury Instructions—Civil

WPI

SEVENTH EDITION

WPI 0.10–140.04

2022 Supplement
Issued in April 2022

Prepared by the
WASHINGTON SUPREME COURT COMMITTEE
ON
JURY INSTRUCTIONS

HON. KRISTIN V. RICHARDSON
Co-Chair
HON. MICHAEL R. SCOTT
Co-Chair



THOMSON REUTERS®

For Customer Assistance Call 1-800-328-4880

- WPI 30.03
- WPI 30.03.01
- WPI 30.05
- WPI 30.06
- WPI 30.07
- WPI 30.07.01
- WPI 30.08
- WPI 30.08.01
- WPI 30.09
- WPI 30.09.01
- WPI 30.10
- WPI 30.11
- WPI 30.12
- WPI 30.13
- WPI 30.17
- WPI 30.18

Chapter 31 (Damages—Wrongful Death and Survival Actions)

- WPI 31.00
- WPI 31.01
- WPI 31.01.01
- WPI 31.01.02
- WPI 31.02
- WPI 31.02.01
- WPI 31.03
- WPI 31.03.01
- WPI 31.03.02
- WPI 31.05
- WPI 31.06
- WPI 31.06.01
- WPI 31.07
- WPI 31.07.01

Chapter 32 (Damages—Injury to Spouse, Domestic Partner, Parent, or Child)

- WPI 32.01
- WPI 32.02
- WPI 32.04
- WPI 32.05
- WPI 32.06
- WPI 32.06.01

Chapter 33 (Damages—Mitigation—Avoidable Consequences)

HIGHLIGHTS

- WPI 33.01
- WPI 33.02
- WPI 33.03

Chapter 34 (Damages—Future—Mortality Tables)

- WPI 34.01
- WPI 34.02
- WPI 34.04

Chapter 35 (Exemplary Damages)

- WPI 35.01

Chapter 41 (Multiple Parties and Pleadings)

- WPI 41.01
- WPI 41.03
- WPI 41.04
- WPI 41.05

Chapter 50 (Agency and Partnership—Torts)

- WPI 50.00
- WPI 50.01
- WPI 50.02
- WPI 50.02.01
- WPI 50.03
- WPI 50.04
- WPI 50.05
- WPI 50.07
- WPI 50.10
- WPI 50.11
- WPI 50.11.01
- WPI 50.12
- WPI 50.13
- WPI 50.14
- WPI 50.18
- WPI 50.20

Chapter 60 (Statutory Violations)

- WPI 60.01.01
- WPI 60.03
- WPI 60.04

Chapter 70 (Motor Vehicles)

- WPI 70.01
- WPI 70.02
- WPI 70.02.01

- WPI 70.02.02
- WPI 70.02.03
- WPI 70.02.04
- WPI 70.02.05
- WPI 70.02.06
- WPI 70.03
- WPI 70.03.02
- WPI 70.03.03
- WPI 70.03.04
- WPI 70.03.05
- WPI 70.04
- WPI 70.05
- WPI 70.06
- WPI 70.08
- WPI 70.09

Chapter 71 (Emergency and Roadwork Vehicles)

- WPI 71.01
- WPI 71.02
- WPI 71.04
- WPI 71.05

Chapter 72 (Guest-Passenger—Joint Venture—Family Car)

- WPI 72.01
- WPI 72.02
- WPI 72.03
- WPI 72.04
- WPI 72.05

Chapter 73 (Motor Vehicles—Railroad Crossings)

Chapter 100 (Common Carriers)

- WPI 100.01
- WPI 100.02
- WPI 100.03
- WPI 100.04
- WPI 100.07
- WPI 100.08
- WPI 100.09
- WPI 100.12
- WPI 100.14
- WPI 100.15

Chapter 110 (Product Liability)

- WPI 110.00

HIGHLIGHTS

- WPI 110.01
- WPI 110.01.01
- WPI 110.02
- WPI 110.02.01
- WPI 110.02.02
- WPI 110.02.03
- WPI 110.02.04
- WPI 110.03
- WPI 110.03.01
- WPI 110.04
- WPI 110.05
- WPI 110.06
- WPI 110.07
- WPI 110.08
- WPI 110.10
- WPI 110.23
- WPI 110.30.01
- WPI 110.30.02
- WPI 110.31.01
- WPI 110.31.01.01
- WPI 110.31.01.02
- WPI 110.31.02

Chapter 155 (Workers' Compensation)

- WPI 155.01
- WPI 155.02
- WPI 155.03
- WPI 155.05
- WPI 155.06
- WPI 155.07
- WPI 155.07.01
- WPI 155.08
- WPI 155.08.01
- WPI 155.09
- WPI 155.10
- WPI 155.11
- WPI 155.11.01
- WPI 155.12
- WPI 155.13
- WPI 155.13.01
- WPI 155.14
- WPI 155.20
- WPI 155.21
- WPI 155.25

- WPI 155.30
- WPI 155.31

Chapter 160 (Fraud)

- WPI 160.01
- WPI 160.02
- WPI 160.03
- WPI 160.04

Chapter 165 (Negligent Misrepresentation)

- WPI 165.00
- WPI 165.01
- WPI 165.02
- WPI 165.03
- WPI 165.03.01
- WPI 165.03.02
- WPI 165.04
- WPI 165.05
- WPI 165.06

Chapter 300 (Contracts—Issues—Burden of Proof)

- WPI 300.00
- WPI 300.01
- WPI 300.01.01
- WPI 300.02
- WPI 300.03

Chapter 301 (Contracts—Formation, Interpretation, and Enforceability)

- WPI 301.01
- WPI 301.02
- WPI 301.03
- WPI 301.04
- WPI 301.05
- WPI 301.06
- WPI 301.07
- WPI 301.08
- WPI 301.09
- WPI 301.10
- WPI 301.11

Chapter 301A (Equitable Alternatives—Promissory Estoppel and Quasi Contract)

- WPI 301A.01
- WPI 301A.02

Chapter 302 (Contracts—Performance and Breach)

- WPI 302.01
- WPI 302.02
- WPI 302.03
- WPI 302.04
- WPI 302.05
- WPI 302.06
- WPI 302.07
- WPI 302.08
- WPI 302.09
- WPI 302.10
- WPI 302.11

Chapter 303 (Contracts—Remedies)

- WPI 303.01
- WPI 303.02
- WPI 303.03
- WPI 303.04
- WPI 303.05
- WPI 303.06
- WPI 303.07
- WPI 303.08

Chapter 310 (Consumer Protection Actions)

- WPI 310.00
- WPI 310.01
- WPI 310.02
- WPI 310.03
- WPI 310.06
- WPI 310.07
- WPI 310.08
- WPI 310.09

Chapter 330 (Employment Discrimination)

- WPI 330.00
- WPI 330.01
- WPI 330.01.01
- WPI 330.01.02
- WPI 330.02
- WPI 330.03
- WPI 330.04
- WPI 330.05
- WPI 330.06

- WPI 330.21
- WPI 330.22
- WPI 330.23
- WPI 330.24
- WPI 330.31
- WPI 330.31.01
- WPI 330.32
- WPI 330.33
- WPI 330.34
- WPI 330.36
- WPI 330.37
- WPI 330.40
- WPI 330.41
- WPI 330.42
- WPI 330.44 (NEW)
- WPI 330.45 (NEW)
- WPI 330.46 (NEW)
- WPI 330.47 (NEW)
- WPI 330.48 (NEW)
- WPI 330.49 (NEW)
- WPI 330.50
- WPI 330.51
- WPI 330.52
- WPI 330.81
- WPI 330.81.01
- WPI 330.81.02
- WPI 330.82
- WPI 330.83
- WPI 330.90
- WPI 330.91

Chapter 351 (Trade Secrets)

- WPI 351.01
- WPI 351.02
- WPI 351.03
- WPI 351.05
- WPI 351.07
- WPI 351.08

Chapter 352 (Tortious Interference with Economic Relations)

- WPI 352.01
- WPI 352.01.01
- WPI 352.02

HIGHLIGHTS

- WPI 352.02.01
- WPI 352.03
- WPI 352.04
- WPI 352.05
- WPI 352.06

Chapter 360 (Behavioral Health Disorders)

- WPI 360.00
- WPI 360.01
- WPI 360.02
- WPI 360.04
- WPI 360.05
- WPI 360.05.01
- WPI 360.05.02
- WPI 360.05.03
- WPI 360.06
- WPI 360.10
- WPI 360.10.01 (NEW)
- WPI 360.10.02 (NEW)
- WPI 360.11
- WPI 360.12
- WPI 360.13
- WPI 360.13.01
- WPI 360.14
- WPI 360.15
- WPI 360.20
- WPI 360.21
- WPI 360.22
- WPI 360.23

Chapter 365 (Sexually Violent Predators)

- WPI 365.00
- WPI 365.01
- WPI 365.02
- WPI 365.10
- WPI 365.11
- WPI 365.12.01
- WPI 365.14
- WPI 365.15
- WPI 365.16
- WPI 365.20
- WPI 365.30
- WPI 365.31
- WPI 365.33

- WPI 365.34
- WPI 365.37

Chapter 370 (Liability for Furnishing Alcohol)

- WPI 370.01
- WPI 370.01.01
- WPI 370.02
- WPI 370.03
- WPI 370.05
- WPI 370.06
- WPI 370.07
- WPI 370.08
- WPI 370.09
- WPI 370.10
- WPI 370.11
- WPI 370.12
- WPI 370.13

Chapter 380 (Nuisance)

- WPI 380.00
- WPI 380.01
- WPI 380.02
- WPI 380.03
- WPI 380.04
- WPI 380.05
- WPI 380.06

WASHINGTON SUPREME COURT COMMITTEE ON JURY INSTRUCTIONS

**As constituted for the Seventh Edition
Supplement of Volumes 6 and 6A**

Committee Co-Chairs

HON. KRISTIN V. RICHARDSON,
King County Superior Court, Seattle

HON. MICHAEL R. SCOTT,
King County Superior Court, Seattle

Committee Members

PROF. DEBORAH M. AHRENS,
Seattle University School of Law, Seattle

EDWIN ARALICA, Attorney, Kent

SARA BEIGH, Attorney, Chehalis

PROF. M. LISA BRADLEY, Gonzaga University School of Law, Spokane

DARRELL L. COCHRAN, Attorney, Tacoma

NANCY P. COLLINS, Attorney, Seattle

MARGARET DUNCAN, Attorney, Everett

HON. ALEXANDER C. EKSTROM,
Benton and Franklin Counties Superior Court, Kennewick

DAVID J. ELDERED, Attorney, Seattle

CHAD M. ENRIGHT, Attorney, Port Orchard

SETH A. FINE, Attorney, Everett

TODD W. GARDNER, Attorney, Seattle

HON. HELEN HALPERT (retired),
King County Superior Court, Seattle

ELIZABETH A. HANLEY, Attorney, Seattle

PETER J. HELMBERGER, Attorney, Tacoma

MARY KAY HIGH, Attorney, Tacoma

HON. GREGG HIRAKAWA, King County District Court, Seattle

PROF. MAUREEN HOWARD,
University of Washington School of Law, Seattle

GARTH L. JONES, Attorney, Hoquiam

KEITH L. KESSLER, Attorney, Hoquiam

BRUCE E. LARSON, Attorney, Seattle

ELIZABETH A. LEEDOM, Attorney, Seattle
HON. AIMEE N. MAURER, Spokane County District Court, Spokane
CHRISTOPHER W. NICOLL, Attorney, Seattle
HON. EDIRIN O. OKOLOKO,
Snohomish County Superior Court, Everett
MARGARET A. PAHL, Attorney, Seattle
HON. MARILYN G. PAJA, Kitsap County District Court, Port Orchard
REBECCA J. ROE, Attorney, Seattle
HON. JAMES E. ROGERS, King County Superior Court, Seattle
DAWN MARIE RUBIO, Administrator for the Courts, Olympia
WILLIAM J. RUTZICK, Attorney, Seattle
DONALD G. STONE, Attorney, Spokane
JACQUE E. ST. ROMAIN, Attorney, Seattle

Counsel and Reporter

STEPHANIE U. HAPPOLD,
Administrative Office of the Courts, Olympia

Subcommittee Members

JOSHUA CHOATE (Chapter 365, Involuntary Treatment—Sexually
Violent Predators), Attorney, Seattle
DAVID K. DEWOLF (Chapter 110, Product Liability; Chapter 160,
Fraud; Chapter 165, Negligent Misrepresentation; Chapter 300,
Contracts—Issues—Burden of Proof; Chapter 301, Contracts—Forma-
tion, Interpretation, and Enforceability; Chapter 301A, Equitable
Alternatives—Promissory Estoppel and Quasi Contract; Chapter 302,
Contracts—Performance and Breach; Chapter 303, Contracts
—Remedies), Attorney, Spokane Valley
DEVON GIBBS (Chapter 365, Involuntary Treatment—Sexually
Violent Predators), Attorney, Seattle
JEFFREY A. JAMES (Chapter 330, Employment Discrimination),
Attorney, Bellevue
HON. LINDA C. KRESE (Ret.) (Chapter 160, Fraud; Chapter 165,
Negligent Misrepresentation; Chapter 300, Contracts—Issues—Burden
of Proof; Chapter 301, Contracts—Formation, Interpretation, and
Enforceability; Chapter 301A, Equitable Alternatives—Promissory
Estoppel and Quasi Contract; Chapter 302, Contracts—Performance
and Breach; Chapter 303, Contracts—Remedies), Snohomish County
Superior Court, Everett
The Late LARRY KUZNETZ (Chapter 330, Employment
Discrimination), Attorney, Spokane
DAVID LAUMAN (Chapter 155, Workers' Compensation), Attorney,
Tacoma
ELIZABETH A. MCINTYRE (Chapter 330, Employment
Discrimination), Attorney, Tumwater

SUPREME COURT COMMITTEE ON JURY INSTRUCTIONS

MARLA POLIN (Chapter 365, Involuntary Treatment—Sexually Violent Predators), Attorney, Spokane

ANDREW SIMONS (Chapter 155, Workers' Compensation), Attorney, Seattle

ANDREA R. VITALICH (Chapter 365, Involuntary Treatment—Sexually Violent Predators), Attorney, Seattle

JESSE ANDREW WING (Chapter 330, Employment Discrimination), Attorney, Seattle

PREFACE

The Washington Pattern Jury Instructions (WPI) Committee operates under the auspices of the Washington Supreme Court, which appoints WPI Committee members from nominees submitted by the Superior Court Judges' Association, District and Municipal Court Judges' Association, Washington State Bar Association, Washington Association of Prosecuting Attorneys, Washington Defenders' Association, Washington Association of Criminal Defense Lawyers, Washington State Association for Justice, Washington Defense Trial Lawyers, University of Washington School of Law, Seattle University School of Law, Gonzaga University School of Law, and the Administrative Office of the Courts. The Supreme Court also provides oversight of the WPI Committee's financial affairs. While often commending the WPI Committee's work to the bench and bar, the Court does not review the instructions in advance of its case-by-case consideration of them.

In an effort to keep our instructions as current as possible, the WPI Committee often publishes updates when we have finished a suitable group of chapters, rather than holding an update until we have completed our review of an entire volume. For this reason, the instructions are not all current as of the same date. Readers should carefully note the currency date of a particular instruction when researching for any subsequent changes in the law. All new and revised instructions for this supplement are included in the Highlights pages.

We would like to thank each of the WPI Committee members, and our staff attorney, Stephanie Happold, for their countless hours of work, their dedication, and their inspired contributions toward improving the law. We also wish to thank the other members of the bench and bar who served on subcommittees focusing on particular specialized areas of the law. Their contributions greatly improve our work.

**HONORABLE KRISTIN V. RICHARDSON,
CO-CHAIR**

**HONORABLE MICHAEL R. SCOTT,
CO-CHAIR**

THOMSON REUTERS

WESTLAW™

MOST PREFERRED ONLINE LEGAL RESEARCH SERVICE

Thomson Reuters Westlaw has been voted the #1 Best Online Legal Research vendor year-after-year by industry professionals. That's because we continually invest more than any other online legal research provider in our people and technology where it matters most. As a result, you find exactly what you need quickly and confidently.

- Build the strongest argument with the most comprehensive collection of legal content
- Deliver better results confidently with WestSearch®, the only search engine designed specifically for the law
- Rely on the most current version of the law with proprietary editorial enhancements
- Access your legal research anytime, anywhere with the free Westlaw apps

LEARN MORE: legal.thomsonreuters.com

SIGN ON: westlaw.com

24/7 REFERENCE ATTORNEYS: 1-800-REF-ATTY (733-2889)

THOMSON REUTERS PROVUE™

This title is one of many now available on your tablet as an eBook.

Take your research mobile. Powered by the Thomson Reuters ProView™ app, our eBooks deliver the same trusted content as your print resources, but in a compact, on-the-go format.

ProView eBooks are designed for the way you work. You can add your own notes and highlights to the text, and all of your annotations will transfer electronically to every new edition of your eBook.

You can also instantly verify primary authority with built-in links to WestlawNext® and KeyCite®, so you can be confident that you're accessing the most current and accurate information.

To find out more about ProView eBooks and available discounts, call 1-800-328-9352.

RELATED PRODUCTS

Thomson Reuters thanks you for subscribing to this product. Should you have any questions regarding this product please contact Customer Service at 1-800-328-4880 or by fax at 1-800-340-9378. If you would like to inquire about related publications or place an order, please contact us at 1-800-328-9352.



THOMSON REUTERS®

Thomson Reuters
610 Opperman Drive
Eagan, MN 55123

legal.thomsonreuters.com

Table of Contents

Volume 6

PART I. GENERAL INSTRUCTIONS

CHAPTER 6. ORAL INSTRUCTIONS DURING TRIAL

WPI 6.00	Introduction
WPI 6.02	Before Recesses
WPI 6.03	View—Before Visiting a Site
WPI 6.05	Before Conducting Experiments or Demonstrations
WPI 6.06	Exhibit Admitted for Illustrative Purposes
WPI 6.07	Limited Purpose Evidence—Generally
WPI 6.08	When a Party or Person May Not Testify
WPI 6.08.01	Excluded Testimony
WPI 6.10.01	Stipulations
WPI 6.10.02	Use of Admissions or Binding Stipulations Under CR 36(b)
WPI 6.11	Use of Interpreters
WPI 6.13.01	Corrected Instruction of Law
WPI 6.14	Probability of Verdict
WPI 6.15	Jury Separation While Deliberating—Admonition
WPI 6.17	Temporarily Excusing Alternate Jurors
WPI 6.19	Jurors Rehearing Trial Testimony—Cautionary Instruction
WPI 6.20	Completion of Trial—Jurors' Discussion of Case
WPI 6.21	Jury Deliberations—Presence of Interpreter

PART II. NEGLIGENCE—RISK—MISCONDUCT—PROXIMATE CAUSE

CHAPTER 12. SPECIFIC FACTORS AFFECTING NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE

WPI 12.09	Nondelegable Duties
-----------	---------------------

PART IV. DAMAGES

CHAPTER 30. PERSONAL AND PROPERTY DAMAGES

WPI 30.00	Introduction
-----------	--------------

PATTERN JURY INSTRUCTIONS—CIVIL

- WPI 30.01 Measure of Damages—Personal and Property—No
 Contributory Negligence
- WPI 30.01.01 Measure of Economic and Noneconomic Damages—
 Personal Injury—No Contributory Negligence
- WPI 30.01.02 Economic Damages—Definition
- WPI 30.01.04 Future Damages—Definition
- WPI 30.02 Measure of Damages—Personal and Property—
 Contributory Negligence—No Counterclaim
- WPI 30.02.01 Measure of Economic and Noneconomic Damages—
 Personal Injury—Contributory Negligence—No
 Counterclaim
- WPI 30.03 Measure of Damages—Personal and
 Property—Counterclaim
- WPI 30.03.01 Measure of Economic and Noneconomic Damages—
 Personal Injury—Counterclaim
- WPI 30.05 Measure of Damages—Elements of Noneconomic
 Damages—Disability, Disfigurement, and Loss of
 Enjoyment of Life
- WPI 30.06 Measure of Damages—Elements of Noneconomic
 Damages—Pain and Suffering, Etc.—Past and Future
- WPI 30.07 Measure of Damages—Elements of Damages—Medical
 Expense—Past and Future
- WPI 30.07.01 Measure of Economic Damages—Elements of Past
 Damages—Medical Expenses
- WPI 30.08 Measure of Damages—Elements of Damages—Loss of
 Earnings—Past and Future—Adult Plaintiff,
 Emancipated Minor, or Minor Whose Parent Has
 Waived Wage Claim
- WPI 30.08.01 Measure of Economic Damages—Elements of Past
 Damages—Loss of Earnings—Adult Plaintiff,
 Emancipated Minor, or Minor Whose Parent Has
 Waived Wage Claim
- WPI 30.09 Measure of Damages—Elements of Damages—
 Household Expenses—Past and Future
- WPI 30.09.01 Measure of Economic Damages—Elements of Past
 Damages—Domestic Services/Nonmedical Expenses
- WPI 30.10 Measure of Damages—Damage to Personal Property—
 Repairs and Depreciation or Difference in Value
 Before and After Damage
- WPI 30.11 Measure of Damages—Damage to Personal Property—
 Repairs or Difference in Value Before and After
 Damage
- WPI 30.12 Measure of Damages—Damage to Personal Property—
 Cost of Repairs and Depreciation of Repaired
 Property
- WPI 30.13 Measure of Damages—Damage to Personal
 Property—Repairs

TABLE OF CONTENTS

WPI 30.17	Aggravation of Pre-Existing Condition
WPI 30.18	Previous Infirm Condition

CHAPTER 31. DAMAGES—WRONGFUL DEATH AND SURVIVAL ACTIONS

WPI 31.00	Introduction
WPI 31.01	Action by Personal Representative
WPI 31.01.01	Measure of Damages—Survival Action—Statutory Beneficiaries
WPI 31.01.02	Measure of Damages—Survival Action—No Statutory Beneficiaries
WPI 31.02	Measure of Damages—Wrongful Death—RCW 4.20.010—Action for Benefit of Spouse
WPI 31.02.01	Measure of Damages—Wrongful Death—Action for Benefit of Spouse / State Registered Domestic Partner
WPI 31.03	Measure of Damages—Wrongful Death—RCW 4.20.010—Action for Benefit of Child or Dependent Parent, Brother or Sister
WPI 31.03.01	Measure of Damages—Wrongful Death—Action for Benefit of Children/Stepchildren
WPI 31.03.02	Measure of Damages—Wrongful Death—Action for Benefit of Parent, Brother, or Sister
WPI 31.05	Action for Wrongful Death by Personal Representative
WPI 31.06	Measure of Damages—Wrongful Death of Child Brought by Parent—RCW 4.20.010
WPI 31.06.01	Measure of Damages—Wrongful Death Actions Brought by Parent for Death of Child—RCW 4.24.010
WPI 31.07	Wrongful Death and Survival Actions—No Contributory Negligence—Special Verdict Form
WPI 31.07.01	Wrongful Death and Survival Actions—Contributory Negligence—Special Verdict Form

CHAPTER 32. DAMAGES—INJURY TO SPOUSE, DOMESTIC PARTNER, PARENT, OR CHILD

WPI 32.01	Measure of Damages—Injury to Spouse
WPI 32.02	Measure of Damages—Medical Expense—Past and Future
WPI 32.04	Measure of Damages—Loss of Consortium—Spouse/ State Registered Domestic Partner
WPI 32.05	Measure of Damages—Loss of Consortium—Parent
WPI 32.06	Measure of Damages—Injury to Child—Action Brought by Parent (RCW 4.24.010)
WPI 32.06.01	Measure of Damages—Injury to Child—Action Brought by Parent or Legal Guardian (RCW 4.24.010)

CHAPTER 33. DAMAGES—MITIGATION—AVOIDABLE CONSEQUENCES

WPI 33.01	Avoidable Consequences—Personal Injury Generally
-----------	--

PATTERN JURY INSTRUCTIONS—CIVIL

- WPI 33.02 Avoidable Consequences—Failure to Secure Treatment
- WPI 33.03 Avoidable Consequences—Property or Business

CHAPTER 34. DAMAGES—FUTURE—MORTALITY TABLES

- WPI 34.01 Damages Arising in Future—Extent and Amount
- WPI 34.02 Future Economic Damages—Present Cash Value
- WPI 34.04 Mortality Table—Limitation on Use

CHAPTER 35. EXEMPLARY DAMAGES

- WPI 35.01 Exemplary or Punitive Damages

PART V. MULTIPLE PARTIES AND PLEADINGS—FORMS OF VERDICTS

CHAPTER 41. MULTIPLE PARTIES AND PLEADINGS

- WPI 41.01 Two or More Plaintiffs—Separate Claims
- WPI 41.03 Two or More Defendants—Different Legal Duties
- WPI 41.04 Fault to Be Apportioned
- WPI 41.05 Counterclaim—Cross-Claim—Third-Party Claim

PART VI. AGENCY AND PARTNERSHIP—TORTS

CHAPTER 50. AGENCY AND PARTNERSHIP—TORTS

- WPI 50.00 Introduction
- WPI 50.01 Agent and Principal—Definition
- WPI 50.02 Agent—Scope of Authority Defined
- WPI 50.02.01 Agent—Scope of Apparent Authority Defined
- WPI 50.03 Act of Agent Is Act of Principal
- WPI 50.04 Both Principal and Agent Sued—No Issue As to Agency or Authority
- WPI 50.05 Principal Sued But Not Agent—No Issue As to Agency or Authority
- WPI 50.07 Principal Sued But Not Agent—Agency or Authority Denied
- WPI 50.10 Deviation From Authority
- WPI 50.11 Independent Contractor—Definition
- WPI 50.11.01 Distinguishing Between Agents and Independent Contractors
- WPI 50.12 Partnership—Definition
- WPI 50.13 Partnership—Scope of Partnership Business Defined
- WPI 50.14 Act of Partner Is Act of All Partners
- WPI 50.18 Corporation Acts Through Its Employees—No Issue As to Scope of Agency
- WPI 50.20 Acting in Concert—RCW 4.22.070—Definition

TABLE OF CONTENTS

PART VII. STATUTORY VIOLATIONS

CHAPTER 60. STATUTORY VIOLATIONS

- WPI 60.01.01 Violation of Statute, Ordinance, or Administrative Rule—Negligence Per Se
- WPI 60.03 Violation of Statute, Ordinance, Administrative Rule, or Internal Governmental Policy—Evidence of Negligence
- WPI 60.04 Standard of Conduct for Child—Violation of Statute, Ordinance, or Administrative Rule

PART VIII. MOTOR VEHICLES

CHAPTER 70. MOTOR VEHICLES

- WPI 70.01 General Duty—Driver or Pedestrian
- WPI 70.02 Right of Way—Uncontrolled Intersection
- WPI 70.02.01 Right of Way—Left Turn
- WPI 70.02.02 Right of Way—Stop Sign
- WPI 70.02.03 Right of Way—Yield Sign
- WPI 70.02.04 Right of Way—Emerging From Alley, Driveway, or Building in Business or Residence District
- WPI 70.02.05 Right of Way—Entering Street or Highway From Private Road or Driveway
- WPI 70.02.06 Right of Way—Deception Doctrine
- WPI 70.03 Right of Way of a Pedestrian Within a Crosswalk
- WPI 70.03.02 Driver Approaching a Crosswalk—Duty to Stop
- WPI 70.03.03 Duty of a Pedestrian Before Entering a Crosswalk
- WPI 70.03.04 Pedestrian Crossing a Roadway Outside of a Crosswalk
- WPI 70.03.05 Crosswalk—Definition
- WPI 70.04 Duty of Following Driver
- WPI 70.05 Speed
- WPI 70.06 Right to Assume Others Will Obey Law—Streets or Highways
- WPI 70.08 Use of Safety Belts
- WPI 70.09 Bicyclists—Statutory Rights and Duties

CHAPTER 71. EMERGENCY AND ROADWORK VEHICLES

- WPI 71.01 Emergency Vehicles—Privileges When Authorized
- WPI 71.02 Authorized Emergency Vehicle—Requirements
- WPI 71.04 Persons or Vehicles at Work on Road
- WPI 71.05 Emergency Vehicles—Right of Way

CHAPTER 72. GUEST-PASSENGER—JOINT VENTURE— FAMILY CAR

- WPI 72.01 Definition of Guest in a Motor Vehicle

PATTERN JURY INSTRUCTIONS—CIVIL

- WPI 72.02 Duty of Driver to Guest
- WPI 72.03 Negligence of Driver Not Attributable to Passenger
- WPI 72.04 Joint Venture
- WPI 72.05 Family Car Doctrine

CHAPTER 73

MOTOR VEHICLES—RAILROAD CROSSINGS

PART IX. PARTICULARIZED STANDARDS OF CONDUCT

CHAPTER 100. COMMON CARRIERS

- WPI 100.01 Common Carrier—Duty to Passengers
- WPI 100.02 Common Carrier—Definition
- WPI 100.03 Common Carrier—Duty to Protect Passengers From Misconduct of Others
- WPI 100.04 Common Carrier—Duty to Protect Passengers From Assault or Intentional Harm by Employees
- WPI 100.07 Conduct of Passengers—Right of Carrier to Eject
- WPI 100.08 Common Carrier—Duty to Disabled, Infirm, or Intoxicated Passenger or to a Child
- WPI 100.09 Passenger—Definition—When Status Begins and Terminates
- WPI 100.12 Common Carriers—Duty to Protect Invitees From Assault
- WPI 100.14 Facilities for Prospective Passengers
- WPI 100.15 Place to Board and Alight—Passengers

CHAPTER 110. PRODUCT LIABILITY

- WPI 110.00 Introduction
- WPI 110.01 Manufacturer's Duty—Defect in Construction
- WPI 110.01.01 Manufacturer's Duty—Express Warranties
- WPI 110.02 Manufacturer's Duty—Design
- WPI 110.02.01 Manufacturer's Duty—Design—Unavoidably Unsafe Products—Negligence—Comment *K*
- WPI 110.02.02 Crashworthiness / Enhanced Damage and Injury—Manufacturing and/Or Design Defect
- WPI 110.02.03 Crashworthiness / Enhanced Damage and Injury—Manufacturing and/Or Design Defect—Burden of Proof—Allocation of Fault
- WPI 110.02.04 Crashworthiness / Enhanced Damage and Injury—Manufacturing and/Or Design Defect—Verdict Form for Use With WPI 110.30.01, 110.30.02, 110.31.01, and 110.31.02
- WPI 110.03 Manufacturer's Duty to Provide Warnings or Instructions With Product

TABLE OF CONTENTS

WPI 110.03.01	Manufacturer's Duty to Provide Warnings or Instructions After the Product Was Manufactured
WPI 110.04	Seller—Manufacturer—Defined
WPI 110.05	Government Contract Specification—Defense
WPI 110.06	Government Specifications—Noncompliance
WPI 110.07	Seller Other Than a Manufacturer
WPI 110.08	Useful Safe Life
WPI 110.10	Assumption of Risk—Contributory Negligence
WPI 110.23	Burden of Proof—Design—Assumption of Risk or Contributory Negligence
WPI 110.30.01	Special Verdict Form—Product Liability—No Affirmative Defenses—No Empty Chairs
WPI 110.30.02	Special Verdict Form—Product Liability—No Affirmative Defenses—Empty Chairs
WPI 110.31.01	Special Verdict Form—Product Liability—Assumption of Risk—Contributory Negligence—No Empty Chairs
WPI 110.31.01.01	Special Verdict Form—Product Liability—Assumption of Risk—Contributory Negligence—No Empty Chairs—Mixed Standards of Care
WPI 110.31.01.02	Fault to Be Apportioned—Product Liability
WPI 110.31.02	Special Verdict Form—Product Liability—Assumption of Risk—Contributory Negligence—Empty Chairs

Volume 6A

PART XI. WORKERS' COMPENSATION

CHAPTER 155. WORKERS' COMPENSATION

WPI 155.01	Conclusion of Trial—Introductory Instruction
WPI 155.02	Board's Findings
WPI 155.03	Burden of Proof
WPI 155.05	Negligence Not An Issue
WPI 155.06	Proximate Cause—Allowed Claim
WPI 155.07	Permanent Total Disability
WPI 155.07.01	Permanent Total Disability—Special Work
WPI 155.08	Permanent Partial Disability—Categories of Impairment
WPI 155.08.01	Permanent Partial Disability—No Categories of Impairment
WPI 155.09	Extent of Disability or Aggravation—Basis of Medical Opinion
WPI 155.10	Extent of Disability

PATTERN JURY INSTRUCTIONS—CIVIL

WPI 155.11	Aggravation—Prior Award
WPI 155.11.01	Aggravation—Prior Award—Burden of Proof
WPI 155.12	Aggravation—No Prior Award
WPI 155.13	Weighing Medical and Lay Testimony
WPI 155.13.01	Testimony of Attending Physician
WPI 155.14	Special Verdict—Workers' Compensation
WPI 155.20	Lighting Up of Pre-Existing, Asymptomatic Condition
WPI 155.21	Worsening of Pre-Existing, Symptomatic Condition
WPI 155.25	Injury to Particular Worker
WPI 155.30	Occupational Disease—Definition
WPI 155.31	Treatment—Definition

PART XII. FRAUD

CHAPTER 160. FRAUD

WPI 160.01	Elements of Fraud
WPI 160.02	Fraud—Burden of Proof
WPI 160.03	Fraud—Burden of Proof—Combined With Preponderance of Evidence
WPI 160.04	Fraud—Burden of Proof on the Issues

CHAPTER 165. NEGLIGENT MISREPRESENTATION

WPI 165.00	Negligent Misrepresentation—Introduction
WPI 165.01	Negligent Misrepresentation—Affirmative Misstatement—Burden of Proof on the Issues
WPI 165.02	Negligent Misrepresentation—Failure to Disclose Information—Burden of Proof on the Issues
WPI 165.03	Negligent Misrepresentation—Failure to Disclose Information—Duty to Disclose
WPI 165.03.01	Duty to Disclose—Mixed Issues of Fact and Law
WPI 165.03.02	Duty to Disclose—Mixed Issues of Fact and Law—Special Verdict Form
WPI 165.04	Negligent Misrepresentation—Failure to Disclose Information—Fiduciary Relationship—Relationship of Trust and Confidence—Definitions
WPI 165.05	Negligent Misrepresentation—Clear, Cogent, and Convincing Evidence
WPI 165.06	Negligent Misrepresentation—Clear, Cogent, and Convincing Evidence—Combined With Preponderance of Evidence

PART XIII. CONTRACTS

CHAPTER 300. CONTRACTS—ISSUES—BURDEN OF PROOF

WPI 300.00	Introduction
WPI 300.01	Issues—Breach of Contract—Damages

TABLE OF CONTENTS

WPI 300.01.01	Issues—Contract—Alternative
WPI 300.02	Burden of Proof on the Issues—Breach of Contract—No Affirmative Defense
WPI 300.03	Burden of Proof on the Issues—Breach of Contract—With Affirmative Defenses

CHAPTER 301. CONTRACTS—FORMATION, INTERPRETATION, AND ENFORCEABILITY

WPI 301.01	Contract Defined
WPI 301.02	Promise Defined
WPI 301.03	Mutual Assent
WPI 301.04	Consideration
WPI 301.05	Contract Interpretation
WPI 301.06	Parol Evidence
WPI 301.07	Contract Modification
WPI 301.08	Enforceability—Mutual Mistake
WPI 301.09	Enforceability—Unilateral Mistake
WPI 301.10	Enforceability—Duress
WPI 301.11	Enforceability—Undue Influence

CHAPTER 301A. EQUITABLE ALTERNATIVES—PROMISSORY ESTOPPEL AND QUASI CONTRACT

WPI 301A.01	Promissory Estoppel
WPI 301A.02	Quasi Contract

CHAPTER 302. CONTRACTS—PERFORMANCE AND BREACH

WPI 302.01	Breach of Contract—Non-Performance of Duty
WPI 302.02	Conditions Precedent or Conditions Concurrent
WPI 302.03	Material Breach—Definition
WPI 302.04	Excuse of Performance—Anticipatory Breach
WPI 302.05	Elements of Equitable Estoppel
WPI 302.06	Excuse of Performance—Estoppel
WPI 302.07	Excuse of Performance—Waiver
WPI 302.08	Excuse of Performance—Interference With Contractual Performance
WPI 302.09	Excuse of Performance—Impossibility or Impracticability
WPI 302.10	Excuse of Performance—Frustration of Purpose
WPI 302.11	Implied Duty of Good Faith and Fair Dealing

CHAPTER 303. CONTRACTS—REMEDIES

WPI 303.01	Measure of Expectation Damages—Breach of Contract—No Counterclaim
WPI 303.02	Measure of Expectation Damages—Breach of Contract—Counterclaim
WPI 303.03	Contract—Measure of Damages—Direct Damages—Special Cases

PATTERN JURY INSTRUCTIONS—CIVIL

WPI 303.04	Contract—Damages—Lost Profits
WPI 303.05	Contract—Reliance Damages
WPI 303.06	Contract—Mitigation of Damages
WPI 303.07	Contract—Liquidated Damages
WPI 303.08	Contract—Damages

PART XIV. CONSUMER PROTECTION

CHAPTER 310. CONSUMER PROTECTION ACTIONS

WPI 310.00	Consumer Protection Act—Introduction
WPI 310.01	Elements of a Violation of the Consumer Protection Act
WPI 310.02	Reasonableness Defense to Consumer Protection Act Claim
WPI 310.03	<i>Per Se</i> Violation of Consumer Protection Act
WPI 310.06	Injury in Consumer Protection Act Claim
WPI 310.07	Causation in Consumer Protection Act Claim
WPI 310.08	Definition—Unfair or Deceptive Act or Practice
WPI 310.09	Definition—Trade or Commerce

PART XVI. EMPLOYMENT

CHAPTER 330. EMPLOYMENT DISCRIMINATION

WPI 330.00	Employment Discrimination—Introduction
WPI 330.01	Employment Discrimination—General—Disparate Treatment—Burden of Proof
WPI 330.01.01	Employment Discrimination—General—Disparate Treatment—Burden of Proof—Substantial Factor
WPI 330.01.02	Employment Discrimination—Disparate Treatment—Adverse Employment Action—Definition
WPI 330.02	Employment Discrimination—Disparate Impact—Definition
WPI 330.03	Employment Discrimination—Disparate Impact—Business Necessity—Burden of Proof
WPI 330.04	Employment Discrimination—Bona Fide Occupational Qualification (BFOQ) Defense
WPI 330.05	Employment Discrimination—Retaliation
WPI 330.06	Employment Discrimination—Retaliation—Adverse Employment Action—Definition
WPI 330.21	Employment Discrimination—Workplace Harassment—General
WPI 330.22	Employment Discrimination—Sexual Harassment—Quid Pro Quo—Burden of Proof
WPI 330.23	Employment Discrimination—Workplace Harassment—Hostile Work Environment—Burden of Proof
WPI 330.24	Employment Discrimination—Harassment—Hostile

TABLE OF CONTENTS

	Work Environment—"Manager" and "Management"—Definitions
WPI 330.31	Employment Discrimination—Disability Discrimination—Definition of Disability
WPI 330.31.01	Employment Discrimination—Disability Discrimination—Definition of Impairment
WPI 330.32	Employment Discrimination—Disability Discrimination—Disparate Treatment—Burden of Proof
WPI 330.33	Employment Discrimination—Disability Discrimination—Reasonable Accommodation— Burden of Proof
WPI 330.34	Employment Discrimination—Disability Discrimination—Reasonable Accommodation—Definition
WPI 330.36	Employment Discrimination—Disability Discrimination—Undue Hardship—Burden of Proof
WPI 330.37	Employment Discrimination—Essential Function—Definition
WPI 330.40	Employment Discrimination—Discrimination Based on Religion or Creed—Failure to Accommodate—Definition
WPI 330.41	Employment Discrimination—Discrimination Based on Religion or Creed—Reasonable Accommodation— Burden of Proof
WPI 330.42	Employment Discrimination—Discrimination Based on Religion or Creed—Failure to Accommodate— Defense of Undue Hardship—Burden of Proof
WPI 330.44	Employment Discrimination—Pregnancy Discrimination—Definition
WPI 330.45	Employment Discrimination—Pregnancy Discrimination—Reasonable Accommodation— Burden of Proof
WPI 330.46	Employment Discrimination—Pregnancy Discrimination—Reasonable Accommodation—Definition
WPI 330.47	Employment Discrimination—Pregnancy Discrimination—Certain Reasonable Accommodations Required
WPI 330.48	Employment Discrimination—Pregnancy Discrimination—Undue Hardship
WPI 330.49	Employment Discrimination—Retaliation Related to Pregnancy Accommodation
WPI 330.50	Employment Discrimination—Wrongful Termination in Violation of Public Policy
WPI 330.51	Employment Discrimination—Wrongful Termination in Violation of Public Policy—Burden of Proof

PATTERN JURY INSTRUCTIONS—CIVIL

- WPI 330.52 Employment Discrimination—Constructive Discharge—Burden of Proof
- WPI 330.81 Employment Discrimination—Damages—Economic and Non-Economic—No After-Acquired Evidence
- WPI 330.81.01 Employment Discrimination—Damages—Economic and Non-Economic—After-Acquired Evidence
- WPI 330.81.02 Employment Discrimination—Damages—After-Acquired Evidence
- WPI 330.82 Employment Discrimination—Damages—Future Lost Earnings (Front Pay)
- WPI 330.83 Employment Discrimination—Damages—Mitigation—Wage Loss
- WPI 330.90 Employment Discrimination—Employee Versus Independent Contractor (Minimum Wage Act)
- WPI 330.91 Employment Discrimination—Joint Employer Status (Minimum Wage Act)

PART XVIII. COMMERCIAL LITIGATION

CHAPTER 351. TRADE SECRETS

- WPI 351.01 Trade Secrets—Burden of Proof
- WPI 351.02 Trade Secret—Definition
- WPI 351.03 Misappropriation—Definition
- WPI 351.05 Independent Economic Value—Definition
- WPI 351.07 Reverse Engineering—Definition
- WPI 351.08 Reasonable Efforts to Maintain Secrecy—Definition

CHAPTER 352. TORTIOUS INTERFERENCE WITH ECONOMIC RELATIONS

- WPI 352.01 Tortious Interference With Contract—Burden of Proof on the Issues—No Affirmative Defense
- WPI 352.01.01 Tortious Interference With Contract—Burden of Proof on the Issues—With Affirmative Defenses
- WPI 352.02 Tortious Interference With Business Expectancy—Burden of Proof on the Issues—No Affirmative Defense
- WPI 352.02.01 Tortious Interference With Business Expectancy—Burden of Proof on the Issues—With Affirmative Defenses
- WPI 352.03 Tortious Interference—Improper Purpose—Improper Means—Definitions
- WPI 352.04 Tortious Interference With Contract—Affirmative Defense—Legally Protected Interest
- WPI 352.05 Tortious Interference With Business Expectancy—Affirmative Defense—Competition
- WPI 352.06 Tortious Interference With Business Expectancy—Affirmative Defense—Financial Interest

TABLE OF CONTENTS

PART XIX. INVOLUNTARY TREATMENT

CHAPTER 360. BEHAVIORAL HEALTH DISORDERS

WPI 360.00	Introduction
WPI 360.01	Advance Oral Instruction—Behavioral Health Disorder—Involuntary Treatment—Introductory
WPI 360.02	Conclusion of Trial—Introductory Instruction—Behavioral Health Disorder—Involuntary Treatment
WPI 360.04	Behavioral Health Disorder—Involuntary Treatment—90 Days
WPI 360.05	Behavioral Health Disorder—Involuntary Treatment—180 Days
WPI 360.05.01	Likelihood of Repeating Similar Acts—Factors
WPI 360.05.02	Less Restrictive Alternative—Behavioral Health Disorder—Involuntary Treatment—Definition
WPI 360.05.03	In Need of Assisted Outpatient Treatment—Definition
WPI 360.06	Burden of Proof—Behavioral Health Disorder—Involuntary Treatment
WPI 360.10	Mental Disorder—Definition
WPI 360.10.01	Behavioral Health Disorder—Definition
WPI 360.10.02	Substance Use Disorder—Definition
WPI 360.11	Custody—Behavioral Health Disorder—Definition
WPI 360.12	Gravely Disabled—Behavioral Health Disorder—Definition
WPI 360.13	Likelihood of Serious Harm—Behavioral Health Disorder—Definition
WPI 360.13.01	Overt Act—Recent—History of Violent Acts—Violent Act—Definitions
WPI 360.14	Behavioral Health Disorder—Respondent's Failure to Testify
WPI 360.15	Behavioral Health Disorder—Expert Testimony—Limitation on Consideration of Evidence
WPI 360.20	Concluding Instruction—Behavioral Health Disorder—Involuntary Treatment
WPI 360.21	Special Verdict Form [A] (90 Days)—Behavioral Health Disorder—Involuntary Treatment
WPI 360.22	Special Verdict Form [A] (180 Days)—Behavioral Health Disorder—Involuntary Treatment
WPI 360.23	Special Verdict Form [B]—Behavioral Health Disorder—Involuntary Treatment—in Need of Assisted Outpatient Treatment

CHAPTER 365. INVOLUNTARY TREATMENT—SEXUALLY VIOLENT PREDATORS

WPI 365.00	Introduction
WPI 365.01	Sexually Violent Predators—Initial Commitment Advance Oral Instruction—Voir Dire

PATTERN JURY INSTRUCTIONS—CIVIL

WPI 365.02	Sexually Violent Predators—Conclusion of Trial— Introductory Instruction
WPI 365.10	Sexually Violent Predators—Elements for Commitment
WPI 365.11	Sexually Violent Predators—Reasonable Doubt—Definition
WPI 365.12.01	Personality Disorder—Definition
WPI 365.14	Sexually Violent Predators—Likely to Engage—Definition
WPI 365.15	Sexually Violent Predators—Recent Overt Act—Definition
WPI 365.16	Sexually Violent Predators—Sexual Violence—Definition
WPI 365.20	Sexually Violent Predators—Concluding Instruction
WPI 365.30	Sexually Violent Predators—Conditional Release (LRA)—Unconditional Discharge—Advance Oral Instruction—Voir Dire
WPI 365.31	Sexually Violent Predators—Conditional Release / Less Restrictive Alternative Placement (LRA)—Elements
WPI 365.33	Sexually Violent Predators—Reasonable Doubt—Less Restrictive Alternative Trial (LRA) / Conditional Release
WPI 365.34	Sexually Violent Predators—Unconditional Discharge Trial—Elements
WPI 365.37	Sexually Violent Predators—Verdict Form— Conditional Release—LRA

PART XX. ALCOHOL LIABILITY

CHAPTER 370. LIABILITY FOR FURNISHING ALCOHOL

WPI 370.01	Furnishing Alcohol—Person Apparently Under the Influence of Alcohol or Obviously Intoxicated Person—Duty
WPI 370.01.01	Furnishing Alcohol—Person Apparently Under the Influence of Alcohol—Definition
WPI 370.02	Furnishing Alcohol—Obviously Intoxicated Person—Definition
WPI 370.03	Furnishing Alcohol—Person Apparently Under the Influence of Alcohol or Obviously Intoxicated Person—Burden of Proof
WPI 370.05	Furnishing Alcohol—Obviously Intoxicated Person— Assault—Burden of Proof
WPI 370.06	Commercial Vendor—Quasi-Commercial Host—Definitions
WPI 370.07	Furnishing Alcohol to Minors—Duty of Commercial Vendor

TABLE OF CONTENTS

WPI 370.08	Furnishing Alcohol to Minors—Commercial Vendor—Burden of Proof
WPI 370.09	Furnishing Alcohol to Minors—Commercial Vendor—Minor Transferee
WPI 370.10	Furnishing Alcohol to Minors—Commercial Vendor—Minor Transferee—Burden of Proof
WPI 370.11	Furnishing Alcohol to Minors—Commercial Vendor—Certification Card Defense
WPI 370.12	Furnishing Alcohol to Minors—Duty of Social Host
WPI 370.13	Furnishing Alcohol to Minors—Social Host—Burden of Proof

PART XXI. NUISANCE

CHAPTER 380. NUISANCE

WPI 380.00	Introduction
WPI 380.01	Nuisance in General—Definition
WPI 380.02	Public/Private Nuisance—Definition
WPI 380.03	Nuisance—Balancing Test
WPI 380.04	Nuisance Per Se
WPI 380.05	Nuisance—Burden of Proof—No Affirmative Defense
WPI 380.06	Nuisance—Burden of Proof—Assumption of Risk Defense (Coming to the Nuisance)

Appendices

Appendix H. Consumer Protection Act *Per Se* Violations

Table of Laws and Rules

Table of Cases

Index

PART I
GENERAL INSTRUCTIONS
CHAPTER 6

ORAL INSTRUCTIONS DURING TRIAL

WPI 6.00	Introduction
WPI 6.02	Before Recesses
WPI 6.03	View—Before Visiting a Site
WPI 6.05	Before Conducting Experiments or Demonstrations
WPI 6.06	Exhibit Admitted for Illustrative Purposes
WPI 6.07	Limited Purpose Evidence—Generally
WPI 6.08	When a Party or Person May Not Testify
WPI 6.08.01	Excluded Testimony
WPI 6.10.01	Stipulations
WPI 6.10.02	Use of Admissions or Binding Stipulations Under CR 36(b)
WPI 6.11	Use of Interpreters
WPI 6.13.01	Corrected Instruction of Law
WPI 6.14	Probability of Verdict
WPI 6.15	Jury Separation While Deliberating—Admonition
WPI 6.17	Temporarily Excusing Alternate Jurors
WPI 6.19	Jurors Rehearing Trial Testimony—Cautionary Instruction
WPI 6.20	Completion of Trial—Jurors' Discussion of Case
WPI 6.21	Jury Deliberations—Presence of Interpreter

WPI 6.00

INTRODUCTION

The instructions in this chapter are not generally part of the court's written instructions on the law. They are designed to be used orally by the court as the particular situation arises during the course of a trial. In *Greene v. Rothschild*, 60 Wn.2d 508, 374 P.2d 566 (1962), overruled on other grounds by 68 Wn.2d 1, 402 P.2d 356 (1965), the court held that the requirements of the predecessors to CR 51 and CRLJ 51, that

instructions be in writing, apply only to instructions on the law and not to necessary admonitions to the jury during trial. Such directions and admonitions to the jury are necessary in order to conduct an orderly trial and to let the jury understand the proceedings and what is expected of them. Lawyers should orally request that the judge give these instructions, directions, or admonitions to the jury at any time during the trial that their use is appropriate.

[Current as of November 2020.]

WPI 6.02**BEFORE RECESSES**

During this recess, and every other recess, do not discuss this case among yourselves or with anyone else, including your family and friends. This applies to your internet and electronic discussions as well—you may not say or write anything about the case via text messages, email, telephone, internet chat, blogs, or social networking web sites. Do not even mention your jury duty in your communications on social media, such as Facebook or Twitter [or (insert other social media sites as appropriate)]. If anybody asks you about the case, or about the people or issues involved in the case, you are to explain that you are not allowed to discuss it.

Do not allow anyone to give you information about the case, including in your electronic communications. If you start to overhear a discussion or start to receive information about anything related to this case, you must act immediately so that you no longer hear or see it. If you become aware that you or another juror has been exposed to outside information, you must privately notify [the bailiff] [(insert other applicable staff person)]; do not discuss these matters with other jurors.

Do not read, view, or listen to any report from the newspaper, magazines, social networking sites, blogs, radio, or television on the subject of this trial. Do not conduct any internet research or consult any other outside sources about this case, the people involved in the case, or its general subject matter. You must keep your mind open and free of outside information. Only in this way will you be able to decide the case fairly based solely on the evidence and my instructions on the law.

NOTE ON USE

Give this oral admonition to the jury at the time of the first recess

and at subsequent recesses as appropriate. The jury will already have been advised of these matters by WPI 1.01 (Advance Oral Instruction—Beginning of Proceedings).

This instruction may also be supplemented with a reminder about what jurors should do with their notes during the recess. See WPI 1.01 (Advance Oral Instruction—Beginning of Proceedings).

It may frequently be advisable to specify for the jurors the particular areas that constitute the “general subject matter.”

COMMENT

The instruction was updated for this edition. No substantive change is intended.

RCW 4.44.280 provides that:

The court may admonish the jurors that they must not discuss among themselves any subject connected with the trial until they begin their deliberations. The court may also admonish the jurors that they must not discuss with nonjurors any subject connected with the trial until the jurors have been dismissed from the case.

[Current as of November 2020.]

VIEW—BEFORE VISITING A SITE

VIEW—BEFORE VISITING A SITE

You will now be taken to view a site or area involved in this case. You will be under the supervision of the [the bailiff] [(insert other applicable staff person)], [Mr.] [Ms.]_____, the entire time that you are away from this courtroom. You must remain together at all times until the [the bailiff] [(insert other applicable staff person)] excuses you.

You will be taken to view the site for the sole purpose of helping you to understand the evidence presented to you in this courtroom. What you actually see at the site and its surrounding area is not evidence. The physical features at the site may have changed. The conditions that prevailed at the time of the occurrence or other relevant times may have changed. You are to rely solely on the testimony of witnesses and on the exhibits admitted in the courtroom in deciding issues involving the physical characteristics or appearance of the site at the time of the events in question.

During the site visit, you may not ask questions or discuss the case among yourselves or with anyone else. The lawyers may not discuss the case or comment on the site, but may be allowed by the court to point out particular features.

NOTE ON USE

This is not one of the written instructions on the law. It is an oral admonition and explanation to the jury, to be given immediately prior to leaving for the view.

After discussion with counsel, the judge should decide the time during the trial when the view will be most helpful to the jury's understanding of the evidence. The judge should give counsel an opportunity to be heard outside the presence of the jury concerning any features to be pointed out.

After a view by the jury, counsel may wish the court to include WPI

2.14 (View of a Site is Not Evidence), in the written instructions at the conclusion of the case.

COMMENT

RCW 4.44.270 permits the court to authorize a view of real property at issue in litigation or the place where a material fact is alleged to have occurred. The statute specifies that “[w]hile the jury are thus absent no person other than the judge, or person so appointed, shall speak to them on any subject connected with the trial.”

The statute provides for a jury view of the scene in the court’s discretion. As a general rule, any denial of a request to view the premises is not error. *Kelley v. Great Northern Ry. Co.*, 59 Wn.2d 894, 371 P.2d 528 (1962). However, under some circumstances, a view of real property that is the subject of an eminent domain proceeding brought by a school district is mandatory. RCW 8.16.070.

The view of the scene is not part of the trial and is not evidence. It is improper to permit any evidence to be offered during the view of the premises. *State v. McVeigh*, 35 Wn.2d 493, 214 P.2d 165 (1950); *Cole v. McGhie*, 59 Wn.2d 436, 361 P.2d 938 (1961) (pointing out the differences between a view and an experiment).

For further discussion, see Tegland, 5 Washington Practice, Evidence Law and Practice §§ 402.44–.45 (6th ed).

[Current as of November 2020.]

WPI 6.05**BEFORE CONDUCTING EXPERIMENTS OR
DEMONSTRATIONS**

The (designated party) will now conduct [an experiment] [a demonstration] in this courtroom.

Observe the conditions under which the [experiment] [demonstration] is made. These conditions may or may not duplicate or approximate the conditions or other circumstances that existed at the time and place of the incident involved in this case. It is for you to decide what weight or value you give to this [experiment] [demonstration] and how and to what extent you apply it to the facts in this case.

NOTE ON USE

Fill in the blank with the party conducting the experiment or demonstration. Use the bracketed phrases as appropriate.

COMMENT

The legal standards for conducting demonstrations are the same as for conducting experiments. See generally Tegland, 5 Washington Practice, Evidence Law and Practice § 402.32 (6th ed.).

Experimental evidence may be admitted to prove the theory of a party as to how an incident may have occurred as well as to prove how it actually occurred. Sufficient similarity between conditions of the experiment and conditions of the incident is all that is required, not identical conditions. Variations in conditions go to the weight to be given the experiment rather than to admissibility, and is a matter to be evaluated by the jury. *Jenkins v. Snohomish Cnty. Pub. Util. Dist. No. 1*, 105 Wn.2d 99, 713 P.2d 79 (1986); *Breimon v. Gen. Motors Corp.*, 8 Wn.App. 747, 509 P.2d 398 (1973). Also see *Nordstrom v. White Metal Rolling & Stamping Corp.*, 75 Wn.2d 629, 453 P.2d 619 (1969).

In a criminal context, the appellate courts have held that demonstrative evidence may be admissible if the experiment was conducted under conditions "reasonably similar" to conditions at the actual event. Whether the similarity is sufficient is for the trial court's discretion.

State v. Stockmyer, 83 Wn.App. 77, 83, 920 P.2d 1201 (1996) (citing State v. Rogers, 70 Wn.App. 626, 855 P.2d 294 (1993)) (video reenactment).

The ultimate test for the admissibility of an experiment as evidence is whether it tends to enlighten the jury and enables them to more intelligently consider the issues presented. When experimental evidence is likely to confuse the jury, raise collateral issues, or is more prejudicial than probative, its admission should be refused. If experimental evidence is admitted, the court should explain to the jury the differences in conditions between the posed evidence and the situation sought to be reconstructed in order to minimize the prejudice or cure misrepresentations. See Jenkins, 105 Wn.2d 99, and the case cited therein.

Particular care should be taken not to combine a view of the premises with an experiment. Such a practice can amount to the reception of evidence acquired outside of court. Cole v. McGhie, 59 Wn.2d 436, 361 P.2d 938 (1961). For the necessity of care and attention to pre-trial or preview or pre-experiment arrangements by the trial judge and counsel, see State v. Gray, 64 Wn.2d 979, 395 P.2d 490 (1964); Cole, 59 Wn.2d 436; Sauls v. Scheppler, 57 Wn.2d 273, 356 P.2d 714 (1960).

[Current as of November 2020.]

WPI 6.06

**EXHIBIT ADMITTED FOR ILLUSTRATIVE
PURPOSES**

I am allowing [this exhibit] [exhibit number _____] to be used for illustrative purposes only. This means that its status is different from that of other exhibits in the case. This exhibit is not itself evidence. Rather, it is one [party's] [witness's] [summary] [explanation] [illustration] [interpretation], offered to assist you in understanding and evaluating the evidence in the case. Keep in mind that actual evidence is the testimony of witnesses and the exhibits that are admitted into evidence.

[Because it is not itself evidence, this exhibit will not go with you to the jury room when you deliberate. The lawyers and witnesses may use the exhibit now and later on during this trial. You may take notes regarding this exhibit if you wish, but you should remember that your decisions in the case must be based upon the actual evidence.]

NOTE ON USE

Use this oral instruction when admitting an exhibit for illustrative purposes only.

Select from the bracketed descriptions of the illustrative exhibit as appropriate, or substitute a more applicable description. The instruction will need to be modified for cases in which more than one exhibit is admitted for illustrative purposes.

If the parties later stipulate that the exhibit may go to the jury room, then the judge at that time should explain this circumstance for the jurors to avoid juror confusion.

COMMENT

Exhibits that tend to be admitted for only illustrative purposes include models, informal drawings of a crime scene, diagrams, and charts or outlines summarizing the evidence in a case. A common example is an expert's diagram drawn during the trial. See Tegland, 5 Washington Practice, Evidence Law and Practice § 402.41 (6th ed.).

Illustrative exhibits are “appropriate to aid the trier of fact in understanding other evidence, where the trier of fact is aware of the limits on the accuracy of the evidence.” *State v. Lord*, 117 Wn.2d 829, 855, 822 P.2d 177 (1991). A chart summarizing evidence may be admitted for illustrative purposes if it represents “a substantially accurate summary of evidence properly admitted. The jury is then free to judge the worth and weight of the evidence summarized in the chart.” *Lord*, 117 Wn.2d at 855–56.

When admitting an exhibit for illustrative purposes only, the judge needs to instruct the jurors as to the meaning of the term “illustrative exhibit.” Further, jurors need to be instructed that an illustrative exhibit, unlike other exhibits, is not evidence and will not be available to them in the jury room. *Lord*, 117 Wn.2d at 856.

[Current as of November 2020.]

WPI 6.07

LIMITED PURPOSE EVIDENCE—GENERALLY

Evidence on the subject of (fill in nature of evidence) **will now be introduced. You may consider this evidence only to determine** (fill in purpose). **You are not to consider this evidence for any other purpose. You are not to discuss this evidence when you deliberate in the jury room except to determine** (fill in purpose).

NOTE ON USE

This is an oral instruction.

Fill in the blanks to conform to the evidence. For the appropriate written instruction to be included in the set of instructions, see WPI 1.06 (Evidence for Limited Purpose).

COMMENT

ER 105.

Generally. When the party against whom evidence is admitted for a limited purpose requests that a limiting instruction be given, an appropriate limiting instruction must be given. ER 105; State v. Aaron, 57 Wn.App. 277, 281, 787 P.2d 949 (1990) (“[ER 105] is mandatory”). The court may give a limiting instruction on its own initiative, but it is under no obligation to do so. State v. Ellard, 46 Wn.App. 242, 730 P.2d 109 (1986). However, it is not error to refuse to instruct when the instruction provided is an incorrect statement of the law or would amount to a comment on the evidence. State v. Gresham, 173 Wn.2d 405, 423–26, 269 P.3d. 307 (2012); State v. Hartzell, 156 Wn.App. 918, 237 P.3d 928 (2010).

This pattern instruction is broadly written to apply to many different circumstances. For example, hearsay may be inadmissible to prove the truth of the matter asserted but admissible to show that the listener had knowledge or notice. Similarly, an admission may be admissible against the party making the admission but not against a co-party.

Criminal convictions offered for impeachment. This instruction is appropriate for use during trial, when a witness’s prior conviction is admissible for impeachment under ER 609. At the conclusion of

the trial, however, the specialized instruction should be used instead (WPI 3.02 (Conviction of Crime—Impeachment)).

Cross-reference. For a more detailed discussion of the case law under ER 105, see the Comments following WPI 1.06 (limited purpose, given at end of trial) and WPI 3.02 (conviction of crime for impeachment, given at end of trial). A detailed discussion of limiting instructions in the context of evidence admitted pursuant to ER 404(b) is contained in the Comment to WPIC 5.30 (Evidence Limited as to Purpose).

[Current as of November 2020.]

WPI 6.08

WHEN A PARTY OR PERSON MAY NOT TESTIFY

(WITHDRAWN)

COMMENT

Subject matter contained in this former instruction is now covered in WPI 6.08.01 (Excluded Testimony).

[Current as of November 2020.]

WPI 6.08.01

EXCLUDED TESTIMONY

My ruling has prevented this witness from testifying [about ____]. Do not make any assumptions about what the witness would have said or speculate about whether the testimony would have been favorable to a particular party.

NOTE ON USE

This oral instruction is designed for use when a claim of privilege is sustained in the presence of the jury. This instruction should not be used in a civil case when the privilege sustained is the privilege against self-incrimination. See Comment. The instruction may also be used, with slight rewording, as a written instruction at the conclusion of the trial.

Use bracketed material as applicable.

COMMENT

A claim of privilege that is sustained is not evidence of anything and the jury is not allowed to draw inferences from it. See *Sumpter v. Nat'l Grocery Co.*, 194 Wash. 598, 78 P.2d 1087 (1938) (physician-patient privilege); *Kiehlhoefer v. Wash. Water Power Co.*, 49 Wash. 646, 96 P. 220 (1908) (physician-patient privilege).

This instruction may be appropriately used when a court upholds an assertion of a testimonial privilege such as the spousal privilege, the physician-patient privilege, the attorney-client privilege, or the like. See generally *Tegland*, 5 Washington Practice, Evidence Law and Practice § 501.5 (6th ed.).

This instruction may also be used in other circumstances when evidence has been excluded, including for example, pursuant to RCW 5.60.030—the “Deadman’s Statute.”

Washington cases have established one exception to this rule. The instruction should not be used when a witness has asserted the privilege against self-incrimination. In a civil case (but not a criminal case), opposing counsel is permitted to invite the jury to draw an adverse inference from the assertion of the privilege. See *Ikeda v. Curtis*, 43 Wn.2d 449, 261 P.2d 684 (1953); *State Farm Fire & Cas. Co. v. Huynh*, 92 Wn.App. 454, 962 P.2d 854 (1998).

[Current as of November 2020.]

WPI 6.10.01**STIPULATIONS**

The parties have agreed that the following evidence will be presented to you:

(Read stipulation into record.)

This is evidence that you will evaluate and weigh with all of the other evidence.

NOTE ON USE

Use this oral instruction when the parties stipulate that particular evidence may be presented to the jury. Use WPI 6.10.02 (Use of Admissions or Binding Stipulations Under CR 36(b)) instead of this instruction if the parties' agreement conclusively establishes the truth of the evidence.

COMMENT

CR 2A governs the use of stipulations.

This instruction is not designed to cover any stipulation that conclusively establishes the truth of the evidence. Such a stipulation removes a factual issue from the jury's consideration and does not involve evidence for the jury to evaluate. In such a case, the jury should be instructed that the fact or facts are not disputed or are agreed upon. In such a case, the judge would need to decide, depending on the significance of the stipulated facts, whether an oral instruction is sufficient or whether the stipulation is important enough that it should be incorporated into an exhibit for the jury or taken into account in the written jury instructions, such as if the stipulation establishes an element of a cause of action. See further discussion in the Comment to WPI 6.10.02 (Use of Admissions or Binding Stipulations Under CR 36(b)).

For example, this instruction should not be used if the parties stipulate that the defendant was driving 60 miles per hour, for this agreement would conclusively establish an issue for the jury. By comparison, this instruction would be appropriate if the parties merely stipulate to the admissibility of a police report estimating the defendant's speed. In *Hawkins v. Marshall*, 92 Wn.App 38, 962 P.2d 834 (1998), the Court of

Appeals reversed a judgment in favor of plaintiff where the trial court determined that the failure to object to the admissibility of medical records admitted pursuant to ER 904 was equivalent to stipulating that the records established the appropriate amount of medical loss. See also ER 904(d).

For a detailed discussion of the issues involved in determining whether a stipulation or admission conclusively establishes the truth of particular evidence, see generally Tegland, 5B Washington Practice, Evidence Law and Practice §§ 801.52–.55 (6th ed.).

[Current as of November 2020.]

WPI 6.10.02**USE OF ADMISSIONS OR BINDING STIPULATIONS
UNDER CR 36(b)**

[The [plaintiff] [defendant] has admitted that certain facts are true.] [The parties have agreed that certain facts are true.] You must accept as true the following facts:

(The judge or attorney should read the admitted or agreed evidence.)

NOTE ON USE

Select the appropriate bracketed phrase.

Use this oral instruction for any admission or other binding stipulation under CR 36(b). The instruction may be reworded to address an agreement of the parties that conclusively establishes evidence for the jury. For non-conclusive admissions or agreements, use WPI 6.10.01 (Stipulations).

This oral instruction is not intended to preclude the judge from exercising discretion as to whether the admission is sufficiently complex that it should also be given to the jury in writing, whether it is incorporated into the final set of written jury instructions or into an exhibit that could go back to the jury room. See the Comment for further discussion.

COMMENT

This instruction may be used when the parties have agreed to a binding stipulation, as well as for use when there is a binding admission.

CR 36(b) provides in part that “any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission.”

There are no Washington cases directly addressing whether a trial court is required to instruct a jury that admissions under CR 36(b) are conclusively established. However, Washington case law establishes that it may be reversible error for a jury to disregard facts that were conclusively established in answers to requests for admissions. See *Nichols v. Lackie*, 58 Wn.App. 904, 795 P.2d 722 (1990) (reversible error

for the jury to award \$2,217.65 in damages when damages of \$3,774.97 were conclusively established by requests for admissions). Thus, the jury should be advised as to the effect of a CR 36 admission to avoid the possibility of reversible error.

The pattern instruction above is to be given orally. Depending on the facts in the case, it may be appropriate to also provide this information to the jury in writing, such as by incorporating the admission or binding stipulation into an exhibit, which could go back to the jury room during deliberations. If the admitted or stipulated facts relate directly to the elements of the cause of action, then the admitted or stipulated facts may be more properly addressed in the final set of written jury instructions.

For cases of admitted liability, the pattern instructions already recognize that the admission or stipulation needs to be reflected in the final set of written instructions. See WPI Chapter 23 (Admitted Liability). For a related discussion in the criminal context about the multiple options for informing jurors about binding stipulations and admissions, see the Comment to WPIC 4.77 (Stipulation as to Undisputed Facts or Elements of Offense).

[Current as of November 2020.]

WPI 6.11

USE OF INTERPRETERS

I am appointing an interpreter to assist a party/witness. I will now administer an oath to the interpreter and then the oath to the witness.

[Oath to interpreter: “Do you solemnly swear or affirm that you will make a true interpretation to (name of party or witness) of all the proceedings in a language or in a manner which (name of party or witness) understands, to the best of your skill and judgment, and that you will repeat the statements of (name of party or witness) to the court in the English language, to the best of your skill and judgment [, so help you God]?”]

I will now administer an oath to [(name of party or witness)] through the interpreter.

NOTE ON USE

This oral instruction is intended for use when an interpreter is needed for a witness or party on the witness stand.

Read the instruction to the jury before the witness or the interpreter is sworn. If an interpreter is needed for a party throughout the proceeding, the instruction and oath will have to be revised accordingly.

Use bracketed material as applicable.

COMMENT

RCW Chapters 2.42 and 2.43; GR 11 and GR 11.2.

The instruction is drafted to apply both to interpreters for persons with a hearing or speech disability (see RCW Chapter 2.42) and to interpreters for non-English speaking persons (see RCW Chapter 2.43).

For a helpful resource on many issues related to language interpreters, see the Deskbook on Language Access in Washington Courts, http://www.courts.wa.gov/programs_orgs/pos_interpret/content/pdf/StateLAP.pdf.

[Current as of December 2020.]

WPI 6.13.01**CORRECTED INSTRUCTION OF LAW**

I am withdrawing instruction number _____, which I gave you. This means that you are not to consider that instruction for any reason. The [the bailiff] [(insert other applicable staff person)] will remove it from the jury room. If you have formed any opinion or conclusion based on the withdrawn instruction, you must reconsider the issues before you without regard to the withdrawn instruction. Instead of instruction number _____, I am giving you the following corrected instruction to replace it in your deliberations:

(Text of new instruction or substance of the change.)

Consider the instruction that I just gave you along with all of the other instructions that I have given you. Do not attach special importance to the fact that this instruction was substituted for the previous one or that it was read separately to you.

You will now return to the jury room to continue your deliberations.

NOTE ON USE

The court should give each party an opportunity to comment and make objections before giving this and its included instruction. The corrected instruction then replaces the withdrawn instruction in the jury room. Do not send this oral instruction to the jury room in writing.

If an instruction is withdrawn and no substitute instruction is given, this instruction must be modified accordingly.

If this instruction is used it should be made a part of the record. The judge and attorneys should make a full record of the proceedings.

COMMENT

CR 51(i); CRLJ 51(i).

The court rules require that, after the jury has begun its deliberations, “[a]ny additional instruction upon any point of law shall be given in writing.” If the corrected instruction is being given in response to a question from a deliberating jury, see the other procedures required under CR 51(i) and CRLJ 51(i).

Numerous cases from other states establish the basic propositions that (1) judges may correct erroneous instructions at any time prior to verdict, and (2) jurors are ordinarily presumed to follow the corrected instructions, thereby curing the original error or rendering it harmless. See generally 75B Am.Jur.2d Trial § 1481 (1992). Only two cases from other jurisdictions hold that an erroneous instruction could not be cured by substituting a correcting instruction during jury deliberations. Both of these cases involved criminal law. In each case, the court held that the accused had been so prejudiced by the erroneous instruction that a correcting instruction was an inadequate remedy. See *U.S. v. Oliver*, 766 F.2d 252 (6th Cir. 1985); *Schultz v. Yeager*, 293 F.Supp. 794 (D.N.J. 1967), affirmed, 403 F.2d 639 (3d Cir. 1968).

In Washington, our guidance regarding correcting instructional error comes primarily from criminal cases. In *State v. Badda*, 68 Wn.2d 50, 411 P.2d 411 (1966), the trial court corrected a verdict form that mistakenly listed the wrong crime. The court held that the verdict form could be corrected even after the jury announced its verdict, as long as the trial court had not yet formally accepted and filed the verdict. The *Badda* court held that the subsequent instruction fully cured any prejudice to the defendant. *Badda*, 68 Wn.2d at 60–64.

In another criminal case, however, the court emphasized that curative instructions may not always be sufficient to correct previous instructional errors. In *State v. Corn*, 95 Wn.App. 41, 975 P.2d 520 (1999), the Court of Appeals stated that “the court examines the facts of each case to determine the prejudice to the defendant and the likelihood that the curative instruction corrected the error in a timely fashion.” In *Corn*, the trial court had misinstructed the jury on the law of self-defense by omitting consideration of the defendant’s subjective belief of imminent harm from the victim. The trial court issued a correcting instruction, but after the jury returned a guilty verdict the trial court granted a new trial. The Court of Appeals affirmed this ruling as being within the bounds of trial court discretion.

In a third criminal case, *State v. Hobbs*, 71 Wn.App. 419, 859 P.2d 73 (1993), the trial court committed reversible error when it eliminated venue from the elements instruction after the jury had begun its deliberations. Even though the defense was allowed to reargue the case to the jury, the defense had already based its cross-examination strategy on the prosecution’s submitted instructions.

The only civil case in Washington addressing a correcting instruction is *Stanley v. Allen*, 27 Wn.2d 770, 180 P.2d 90 (1947). The trial court erred by amending an instruction in a manner that added a new issue to the case beyond those formally pleaded and that inaccurately suggested which party had the burden of proof. *Stanley*, 27 Wn.2d at 782–84. *Stanley* therefore merely stands for the proposition that a “correcting” instruction will not be upheld on appeal when it in fact incorrectly states the law.

[Current as of December 2020.]

WPI 6.14

PROBABILITY OF VERDICT

I have called you back into the courtroom to find out whether you have a reasonable probability of reaching a verdict. Because you are in the process of deliberating, it is essential that you give no indication about how the deliberations are going. You must not make any remark here in the courtroom that may adversely affect the rights of any party or may in any way disclose your opinion of this case or the opinions of other members of the jury.

I am going to ask your presiding juror if there is a reasonable probability of the jury reaching a verdict within a reasonable time [as to any one of the claims] [or] [any one of the parties]. The presiding juror must restrict [his] [her] answer to “yes” or “no” when I ask [him] [her] this question and must not say anything else.

(Address the following question to the presiding juror:) Is there a reasonable probability of the jury reaching a verdict [within a reasonable time [as to] [any one of the claims] [or] [any one of the parties]]?

(The judge may wish to poll individual jurors.)

[The [the bailiff] [(insert other applicable staff person)] will now take you back to the jury room in order to continue your deliberations [and complete the verdict form or forms as to any claim on which you are able to reach a verdict].]

NOTE ON USE

Use this instruction when the jury is brought back into the courtroom during deliberations either because the jury has indicated that it may be deadlocked or the judge is contemplating the possible discharge of the jury as a deadlocked jury. Use bracketed material as applicable to find out whether the jury may have a verdict or be able to reach a verdict on some of the claims or as to some of the parties and possibly be deadlocked on others.

All attorneys must be given the opportunity to be present, and a full record must be made of the proceedings.

If the jury indicates it is deadlocked, the judge may consider whether to offer assistance to the jury by using WPI 1.12 (Deadlocked Jury).

COMMENT

This instruction has been modified for this edition to reflect the possibility that the jury is deadlocked as to only some of the parties or some of the claims. The prior version only discussed the jury being deadlocked as to some of the claims.

Inquiry as to the probability of reaching a verdict and the discharge of a deadlocked jury are substantial parts of the trial. Such communication with the jury should be done only in open court, after an opportunity has been given to all attorneys to be present.

CR 51(i) specifically requires any additional instruction to the jury on any point of law to be given in open court and in writing. See *State v. Hunsaker*, 74 Wn.App. 209, 873 P.2d 546 (1994); *State v. Robinson*, 9 Wn.App. 644, 513 P.2d 837 (1973), reversed on other grounds, 84 Wn.2d 42, 523 P.2d 1192 (1974).

In *Iverson v. Pacific American Fisheries*, 73 Wn.2d 973, 442 P.2d 243 (1968), the court specifically admonished that a deliberating jury should not disclose in open court to the judge how they stand numerically on the merits of the case.

In order to determine whether the jury is deadlocked, the court may make certain limited inquiries. The court may poll individual jurors or, in its discretion, the court may rely upon the representations of the presiding juror. See *State v. McCullum*, 28 Wn.App. 145, 622 P.2d 873 (1981) (not error under the circumstances to poll each juror), reversed on other grounds, 98 Wn.2d 484, 656 P.2d 1064 (1983). Regardless of the method used, the court must take pains to avoid coercing or interfering with the jury's deliberations. *State v. Dykstra*, 33 Wn.App. 648, 656 P.2d 1137 (1983). Care must be taken in any inquiry not to coerce the jury into reaching a verdict. *State v. Ford*, 171 Wn.2d 185, 192, 250 P.3d 97 (2011) (A claim of judicial coercion requires a showing that the jury was still within "its deliberative process" and was still undecided at the time of the inquiry).

The length of deliberations is not sufficient basis by itself for the judge to discharge a jury. *State ex rel. Charles v. Bellingham Mun.*

Court, 26 Wn.App. 144, 612 P.2d 427 (1980). Similarly, it was error to discharge a jury based on the jurors' statement that they could not reach a verdict within the next ninety minutes, without agreement from all jurors that they were hopelessly deadlocked. *State v. Jones*, 97 Wn.2d 159, 641 P.2d 708 (1982).

If it is determined that the jury is deadlocked, the judge may consider whether to offer assistance to the jury or give any additional instruction. See WPI 1.12 (Deadlocked Jury). Any additional instruction must be cautiously worded to avoid any suggestion of coercion. See *State v. Watkins*, 99 Wn.2d 166, 660 P.2d 1117 (1983).

[Current as of December 2020.]

WPI 6.15**JURY SEPARATION WHILE
DELIBERATING—ADMONITION**

I am releasing you for [the evening] [the weekend]. You must report back to this courtroom at (state the time) to resume your deliberations.

Even though you are now free to discuss the case among yourselves in the jury room, you are not permitted to discuss the case with one another outside of the jury room.

Further, as I have explained to you before, do not allow anyone to give you information about the case, including in your electronic communications. During this recess, and every other recess, do not discuss this case among yourselves or with anyone else, including your family and friends. This applies to your internet and electronic discussions as well — you may not say or write anything about the case via text messages, email, telephone, internet chat, blogs, or social networking web sites. Do not even mention your jury duty in your communications on social media, such as Facebook or Twitter [or (insert other social media sites as appropriate)]. If anybody asks you about the case, or about the people or issues involved in the case, you are to explain that you are not allowed to discuss it.

Do not allow anyone to give you information about the case, including in your electronic communications. If you start to overhear a discussion or start to receive information about anything related to this case, you must act immediately so that you no longer hear or see it. If you become aware that you or another juror has been exposed to outside information, you must privately notify [the bailiff] [(insert other applicable staff person)]; do not discuss these matters with other jurors.

Do not read, view, or listen to any report from the

newspaper, magazines, social networking web sites, blogs, radio, or television on the subject of this trial. Do not conduct any internet research or consult any other outside sources about this case, the people involved in the case, or its general subject matter. You must keep your mind open and free of outside information. Only in this way will you be able to decide the case fairly based solely on the evidence and my instructions on the law.

As I have previously instructed you, you are not to try to find any evidence or do any legal research on your own. Do not inspect the site of any event involved in a case. If your ordinary travel will result in passing or seeing the site of any event involved in this case, do not stop or try to investigate. Again, you must keep your mind clear of anything that is not presented to you in this courtroom.

When you return, you must not discuss the case until all of the jurors are reassembled in the jury room. No discussion about the case should take place until your presiding juror determines that each juror is present in the jury room and announces that deliberations are resumed.

NOTE ON USE

Give this oral instruction to the jury if the judge allows the jury to separate during deliberations. If this instruction is used, it must be read to the jury in open court.

Fill in the blanks with appropriate times.

COMMENT

The instruction has been modified for this edition to be consistent with WPI 6.02 (Before Recesses).

CR 47(i)(1).

The court rule provides that “[d]uring trial and deliberations the jury may be allowed to separate unless good cause is shown, on the record, for sequestration of the jury.”

[Current as of December 2020.]

WPI 6.17**TEMPORARILY EXCUSING ALTERNATE JURORS****COMMENT**

The instruction was revised in 2010 and in 2018 to address in more detail the prohibitions against improper juror communications, especially with regard to electronic communications and information. For further discussion of the development of this pattern instruction, see the Comment to WPI 6.17.01 (Fully Discharging Alternate Jurors).

WPI 6.19**JURORS REHEARING TRIAL TESTIMONY—
CAUTIONARY INSTRUCTION**

You have asked to rehear (identify the requested trial testimony).
After consulting with the attorneys, I am granting your request.

In making this decision, I want to emphasize that I am making no comment on the value or weight to be given to any particular testimony in this case.

The testimony you requested will be [read to you] [replayed for you] here in the courtroom. You will hear it only one time.

After you have heard the testimony, you will return to the jury room and resume your deliberations. When you do, remember that your deliberations must take into account all the evidence in the case, not just the testimony that you have asked to rehear.

NOTE ON USE

This cautionary instruction should be used whenever the judge decides to grant a deliberating jury's request to rehear selected trial testimony.

Although judges have discretion in responding to these requests, the case law disfavors repeating trial testimony for deliberating jurors. See the Comment.

COMMENT

Repeating testimony, although discretionary, is disfavored. Judges have discretion when ruling on a deliberating jury's request to have testimony repeated for them. *State v. Monroe*, 107 Wn.App. 637, 27 P.3d 1249 (2001). This discretion exists whether the testimony is read for jurors from a trial transcript or is replayed for jurors from an electronic recording. See *State v. Koontz*, 145 Wn.2d 650, 655–58, 41 P.3d 475 (2002) (citing *State v. Caliguri*, 99 Wn.2d 501, 664 P.2d 466 (1983) as to rereading trial transcripts, and citing Ninth Circuit cases

with approval as to replaying videotaped testimony). Although these precedents are criminal cases, the WPI Committee assumes that this discretion would also exist in civil cases. See, e.g., Annot., *Right to Have Reporter's Notes Read to Jury*, 50 A.L.R.2d 176, 178 (1956); see 75B Am.Jur.2d Trial § 1386 (2021) (including both civil and criminal cases).

Repeating trial testimony for deliberating jurors, however, is disfavored in the case law, at least for criminal cases. See Koontz, 145 Wn.2d at 654. The concern addressed in the case law is that rereading requested selections from a trial transcript can lead jurors to give undue emphasis to the selected testimony. Koontz, 145 Wn.2d at 654; *State v. Monroe*, 107 Wn.App. 637. Although not yet addressed in our state's appellate opinions, an additional concern is that reading the trial transcript selections to the jurors could constitute an unconstitutional comment on the evidence. See Const. art. IV, § 16.

These concerns may be heightened with regard to trial testimony that has been recorded by means of an audio-video recording. Replaying a video recording, in particular, "allows the jury to hear and see more than the factual elements contained in a transcript." Koontz, 145 Wn.2d at 655. Moreover, the video record "does not duplicate the perspective or view of the jurors during trial," it "may focus on things the jurors did not consider during trial," and in essence it gives the jury a different view of the trial. Koontz, 145 Wn.2d at 654–55.

Court rules. CR 51(i) and CRLJ 51(i) each authorize a court to grant a jury's request to rehear or replay evidence. The rules state:

In its discretion, the court may grant a jury's request to rehear or replay evidence, but should do so in a way that is least likely to be seen as a comment on the evidence, in a way that is not unfairly prejudicial and in a way that minimizes the possibility that jurors will give undue weight to such evidence.

Caution needed. Although judges have discretion to repeat testimony at a jury's request, this discretion needs to be exercised with care. The WPI Committee recognizes, in fact, that in many cases the request for repeated testimony should be denied.

For example, jurors often request the testimony of a single witness rather than requesting balanced testimony from multiple witnesses that more accurately reflects the positions taken by both parties. If the judge grants such a limited request, then one party's version of the case might be unduly emphasized, yet if the judge expands on the request by repeating the requested testimony along with other relevant testimony, then the judge runs the risk of improperly commenting on the evidence.

Moreover, the judge needs to take into account the time necessary to locate and reread testimony for jurors, especially if the judge is supplementing the jury's request with additional testimony necessary for a balanced presentation of the evidence.

Additionally, if a jury's request is not sufficiently specific as to clearly indicate which testimony is being requested, the judge should require greater specificity, or deny the request altogether, rather than make subjective decisions as to which particular passages relate to the jury's request.

Because of the difficulty in resolving these issues, the WPI Committee recommends that the jurors be told at the beginning of the trial and before deliberations that they will rarely, if ever, be able to rehear testimony. See WPI 1.01 (Advance Oral Instruction—Beginning of Proceedings), WPI 1.08 (Concluding Instruction—For General Verdict Form), and WPI 1.11 (Concluding Instruction—For Special Verdict Form).

Procedures. If selections from the trial transcript are going to be read to jurors, the judge needs to carefully consider the proper procedures. The Washington State Jury Commission's Report to the Board for Judicial Administration (July 2000) emphasizes that appropriate safeguards must be in place before testimony is repeated:

Judges should give a cautionary instruction advising jurors to keep in mind all the evidence in the case, not just the testimony being reheard or replayed, and advising that the judge is not making any comment on the value or credibility of the testimony at issue. The testimony should be read or played to the jurors in the courtroom and should not be given to the jurors in written form to take to the jury room. Because of concerns over commenting on the evidence, the judge ordinarily should not select additional testimony for the jury to hear along with the requested testimony.

Jury Commission's Recommendation 40 (accompanying text).

State v. Koontz, 145 Wn.2d 650, 657, 41 P.3d 475 (2002), highlights additional procedural issues to consider when deciding whether to replay videotaped trial testimony:

Protections to prevent undue emphasis in the manner of video replay may include replay in open court, court control over replay, and review by both counsel before presentation to the jury. Other protections may include the extent to which the jury is seeking to review facts, the proportion of testimony to be replayed in relation

to the total amount of testimony presented, and the inclusion of elements extraneous to a witness' testimony. A determination to allow videotape replay should balance the need to provide relevant portions of testimony in order to answer a specific jury inquiry against the danger of allowing a witness to testify a second time. It is seldom proper to replay the entire testimony of a witness. These considerations are not exhaustive . . .

Caveat. Washington's case law has not yet addressed these issues of repeating testimony in the context of a civil case, nor has it considered whether repeating testimony can constitute a judicial comment on the evidence. See Const. art. IV, § 16.

[Current as of December 2020.]

WPI 6.20

COMPLETION OF TRIAL—JURORS' DISCUSSION
OF CASE

Having completed your service on this trial, you may now discuss this case and your jury service with others, including the attorneys involved in this case. You are not, however, required to do so. You have the right to choose not to answer any questions about this case, whether the questions are asked by the attorneys or by anyone else.

You may choose to answer some questions and not others. For example, some jurors choose to talk about what happened in the courtroom but not about what happened during deliberations. The choice is entirely yours.

You should be considerate of the privacy interests and expectations of your fellow jurors. In particular, please do not reveal other jurors' names, addresses, or telephone numbers.

NOTE ON USE

Use this instruction when thanking jurors for their service after a verdict has been rendered or the trial has otherwise been completed. The instruction may be modified as each judge sees fit.

COMMENT

Background. The Washington State Jury Commission has recommended that the court, before dismissing jurors from service on a trial, should inform jurors of their rights to discuss or refrain from discussing the case. Washington State Jury Commission's Report to the Board for Judicial Administration (July 2000) (Recommendation 20). The Jury Commission also recommends that jurors "should be cautioned about the privacy interests of their fellow jurors and should be reminded not to disclose identifying information about other jurors." Washington State Jury Commission's Report, Recommendation 20 (narrative section). See GR 31(j) (creating a presumption of privacy for individual juror information other than name).

Judge meeting with jurors after trial. The Jury Commission's

report also encourages judges to meet with jurors in an informal setting after the trial is completed. Washington State Jury Commission's Report, Recommendation 17 (narrative section). These debriefing meetings can help relieve juror stress and can give judges valuable feedback as to jurors' perspectives on courtroom procedures.

The judge must exercise caution during any such debriefing session. The judge should advise the jurors at the outset that, even though they may discuss the case with others as they see fit, during the debriefing session with the judge they should not discuss or comment on the way they arrived at their verdict or anything they said during deliberations. See generally Kelley, *Addressing Juror Stress: A Trial Judge's Perspective*, 43 Drake L.Rev. 97, 116–22 (1994) (discussing the value of, and recommending procedures for, post-trial debriefing sessions between the judge and jurors).

The judge must not commend or criticize jurors for their verdict, but may thank them for their service. See Code of Judicial Conduct Canon 2.8. The judge must retain an impartial demeanor during these sessions, and must refrain from expressing personal opinions about the evidence, the law, or the participants involved in the trial. See generally CJC Canons 1.2 (on avoiding the appearance of impropriety) and 2.2 (on performing judicial duties impartially). Judges may not use these conferences to inquire into the factual basis for the jury's decision, to furnish the basis for a new trial, or to cause the jury to alter its verdict. See *Fitzell v. Rama Indus., Inc.*, 416 So.2d 1246 (Fla. Dist. Ct. App. 1982).

During the debriefing session, the judge may wish to elaborate on the instruction that the jurors are free to choose whether to discuss the case or their deliberations with others. The judge may remind them that some jurors may have made comments during the deliberations with the expectation that the comments remain confidential.

[Current as of December 2020.]

WPI 6.21

**JURY DELIBERATIONS—PRESENCE OF
INTERPRETER**

A juror requires the assistance of American Sign Language interpreters. Interpreters are not jurors and do not participate in jury deliberations in any manner. However, sign language interpreters must be present in the jury room to facilitate communication among all the jurors.

Words spoken by the interpreter are the words of the juror. On occasion, however, the interpreter may require clarification. If this occurs, the interpreter will clearly identify that these are the interpreter's words and not those of the juror.

Please keep in mind that the interpreter must be able to clearly interpret each juror's words. Jurors should make every effort not to talk at the same time and to avoid side conversations. Jurors should speak directly to a juror who is hearing impaired and not to the interpreter.

Two interpreters will be present during the deliberations and will substitute for each other at periodic intervals. While one of these interpreters is working as the primary interpreter, the other will be silent and sit unobtrusively, except to occasionally assist the primary interpreter to ensure accurate interpretation.

Interpreters will strictly follow their ethical codes. All information obtained by the interpreters in the course of their assignment in this courtroom will be kept confidential.

NOTE ON USE

This instruction is intended to assist jurors in a trial in which a hearing-impaired juror is being assisted by American Sign Language

interpreters. The instruction may be used both at the beginning of the case and before deliberations. When used at the beginning of the case, the instruction may be modified to remove some of the deliberation-specific language.

COMMENT

This instruction has been modified for this edition. No substantive change is intended.

Courts sometimes appoint qualified American Sign Language interpreters to assist hearing-impaired jurors in fulfilling their duties. See General Rule 11 (Court Interpreters), General Rule 33 (Requests for Accommodation by Persons with Disabilities); Americans with Disabilities Act of 1990, 42 U.S.C. § 12101. Interpreters are being used not only in the courtroom, but also in the jury room during deliberations. See, e.g., the commentary for Recommendation 11 of the Washington State Jury Commission's Final Report (recognizing that courts have begun allowing ASL interpreters to assist hearing-impaired jurors during deliberations) (available on the www.courts.wa.gov website).

Interpreters are subject to a code of ethics written by the National Registry of Interpreters for the Deaf, Inc., and the Washington State Code of Conduct for Court Interpreters, GR 11.2.

[Current as of December 2020.]

PART II

**NEGLIGENCE—RISK—MISCONDUCT—
PROXIMATE CAUSE**

CHAPTER 12

**SPECIFIC FACTORS AFFECTING
NEGLIGENCE AND CONTRIBUTORY
NEGLIGENCE**

WPI 12.09 Nondelegable Duties

WPI 12.09

NONDELEGABLE DUTIES

(Fill in name of person or entity) **is not relieved of its duty to** (particular duty) **by delegating or seeking to delegate that duty to another person or entity.**

NOTE ON USE

The WPI Committee recommends that this instruction be used only in cases involving subcontracted work or other circumstances that could mislead jurors into thinking that a nondelegable duty has been delegated. See the discussion in the Comment.

If a factual issue exists as to whether a duty is owed, the instruction should be revised to avoid an improper comment on the evidence.

COMMENT

Some duties may be delegated; others may not. *Afoa v. Port of Seattle*, 191 Wn.2d 110, 121, 421 P.3d 903 (2018) (a jobsite owner has a nondelegable duty to maintain a safe workplace only if it maintains a sufficient degree of control over the work). Duties may be made nondelegable by statute, regulation, common law, or contract. DeWolf & Allen, 16 Washington Practice, Tort Law and Practice § 4:14 (5th ed.); Tauscher

v. Puget Sound Power & Light Co., 96 Wn.2d 274, 282–87, 635 P.2d 426 (1981).

Nondelegable duties often involve a form of vicarious liability. See DeWolf & Allen, 16 Washington Practice, Tort Law and Practice § 4:14 (5th ed.); *Jackson v. Standard Oil Co. of Cal.*, 8 Wn.App. 83, 95, 505 P.2d 139 (1972). However, a contractor's nondelegable duty can also be "primary" as opposed to vicarious when the contractor has delegated performance to an independent contractor. *Vargas v. Inland Wash., LLC*, 194 Wn.2d 720, 738, 452 P.3d 1205 (2019).

In some circumstances, primarily those involving subcontracted work, the jury must be instructed that a particular duty is nondelegable. See *Jones v. Robert E. Bayley Constr. Co., Inc.*, 36 Wn.App. 357, 362–63, 674 P.2d 679 (1984) (failing to instruct on nondelegability is prejudicial error when the proposed instruction is supported by evidence that work has been contracted out), overruled on other grounds, *Brown v. Prime Const. Co., Inc.*, 102 Wn.2d 235, 240 n.2, 684 P.2d 73 (1984); see also *Keegan v. Grant Cnty. Pub. Util. Dist. No. 2*, 34 Wn.App. 274, 284, 661 P.2d 146 (1983) (approving an instruction on nondelegability because work had been contracted out); *Vargas*, 194 Wn.2d at 735–36 (a contractor has both a statutory and common law duty to provide a safe place to work, regardless of whether the contractor retains control of the workplace).

The court in *Thoen* applied the rulings of *Vargas* and found that the trial court erred in its instructions. The trial court had instructed the jury that a general contractor met the standard of ordinary care if it took reasonable steps to provide a safe work environment "within common areas it controls." *Thoen v. CDK Constr. Servs., Inc.*, 13 Wn.App.2d 174, 181, 466 P.3d 261 (2020). The Washington Supreme Court had "rejected this 'common work area' concept in *Vargas* and explained a general contractor's common law duty actually extends to all portions of a job site 'regardless of whether an expert other than the general contractor happens to be in charge of a specific job in the area.'" *Thoen*, 13 Wn.App.2d at 181. Under these circumstances, jurors could easily speculate that the legal duty was transferred along with the work being subcontracted, and they would need to be instructed that nondelegable duties are not transferred along with the subcontracted work.

For cases that do not similarly raise questions in jurors' minds about potential delegability, the WPI Committee recommends that the instruction not be given. For several reasons, nondelegability instructions should be used with caution: "nondelegability" is a "formidable" word to use with a jury, *Kelley v. Great N. Ry. Co.*, 59 Wn.2d 894, 904–05, 371 P.2d 528 (1962), it is often not necessary to the case. The

word “nondelegable” can mislead jurors into thinking a nondelegable duty sets a higher standard of care than does a delegable duty. *Sage v. N. Pac. Ry. Co.*, 62 Wn.2d 6, 16, 380 P.2d 856 (1963); *Strandberg v. N. Pac. Ry. Co.*, 59 Wn.2d 259, 367 P.2d 137 (1961); *Kelley*, 59 Wn.2d 894 (all three cases holding that instructing on nondelegability is not reversible error).

[Current as of November 2021.]

PART IV
DAMAGES
CHAPTER 30

PERSONAL AND PROPERTY DAMAGES

- WPI 30.00 Introduction
- WPI 30.01 Measure of Damages—Personal and Property—No Contributory Negligence
- WPI 30.01.01 Measure of Economic and Noneconomic Damages—Personal Injury—No Contributory Negligence
- WPI 30.01.02 Economic Damages—Definition
- WPI 30.01.04 Future Damages—Definition
- WPI 30.02 Measure of Damages—Personal and Property—Contributory Negligence—No Counterclaim
- WPI 30.02.01 Measure of Economic and Noneconomic Damages—Personal Injury—Contributory Negligence—No Counterclaim
- WPI 30.03 Measure of Damages—Personal and Property—Counterclaim
- WPI 30.03.01 Measure of Economic and Noneconomic Damages—Personal Injury—Counterclaim
- WPI 30.05 Measure of Damages—Elements of Noneconomic Damages—Disability, Disfigurement, and Loss of Enjoyment of Life
- WPI 30.06 Measure of Damages—Elements of Noneconomic Damages—Pain and Suffering, Etc.—Past and Future
- WPI 30.07 Measure of Damages—Elements of Damages—Medical Expense—Past and Future
- WPI 30.07.01 Measure of Economic Damages—Elements of Past Damages—Medical Expenses
- WPI 30.08 Measure of Damages—Elements of Damages—Loss of Earnings—Past and Future—Adult Plaintiff, Emancipated Minor, or Minor Whose Parent Has Waived Wage Claim
- WPI 30.08.01 Measure of Economic Damages—Elements of Past Damages—Loss of Earnings—Adult Plaintiff, Emancipated Minor, or Minor Whose Parent Has Waived Wage Claim
- WPI 30.09 Measure of Damages—Elements of Damages—Household Expenses—Past and Future

DAMAGES

WPI 30.09.01	Measure of Economic Damages—Elements of Past Damages—Domestic Services/Nonmedical Expenses
WPI 30.10	Measure of Damages—Damage to Personal Property—Repairs and Depreciation or Difference in Value Before and After Damage
WPI 30.11	Measure of Damages—Damage to Personal Property—Repairs or Difference in Value Before and After Damage
WPI 30.12	Measure of Damages—Damage to Personal Property—Cost of Repairs and Depreciation of Repaired Property
WPI 30.13	Measure of Damages—Damage to Personal Property—Repairs
WPI 30.17	Aggravation of Pre-Existing Condition
WPI 30.18	Previous Infirm Condition

WPI 30.00

INTRODUCTION

RCW 4.56.250(1) defines economic and noneconomic damages in actions for personal injury or death. Economic damages are “objectively verifiable monetary losses, including medical expenses, loss of earnings, burial costs, loss of use of property, cost of replacement or repair, cost of obtaining substitute domestic services, loss of employment, and loss of business or employment opportunities.” RCW 4.56.250(1)(a). Noneconomic damages are “subjective, nonmonetary losses, including, but not limited to pain, suffering, inconvenience, mental anguish, disability or disfigurement incurred by the injured party, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation, and destruction of the parent-child relationship.” RCW 4.56.250(1)(b).

Although the 1986 Tort Reform Act originally capped the amount of noneconomic damages that may be recovered pursuant to a formula based on a percentage of the average annual wage and the life expectancy of the person incurring the damages, this cap was later struck down as unconstitutional in *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 771 P.2d 711, 780 P.2d 260 (1989) (interpreting the constitutional right to a jury trial). The statute has not been amended to reflect the *Sofie* holding.

[Current as of April 2021.]

WPI 30.01

MEASURE OF DAMAGES—PERSONAL AND
PROPERTY—NO CONTRIBUTORY NEGLIGENCE
(WITHDRAWN)

[Current as of April 2021.]

WPI 30.01.01

**MEASURE OF ECONOMIC AND NONECONOMIC
DAMAGES—PERSONAL INJURY—NO
CONTRIBUTORY NEGLIGENCE**

It is the duty of the court to instruct you as to the measure of damages. [By instructing you on damages the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for the plaintiff, then] you must determine the amount of money that will reasonably and fairly compensate the plaintiff for such damages as you find were proximately caused by the negligence of the defendant.

[If you find for the plaintiff] [your verdict must include the following undisputed items:

(here insert undisputed past economic damage amounts)

In addition] you should consider the following past economic damages elements:

(here insert appropriate elements from among phrases WPI 30.07.01, WPI 30.08.01, WPI 30.09.01, and WPI 30.10-.16)

In addition you should consider the following future economic damages elements:

(here insert appropriate elements from among phrases WPI 30.07.02, WPI 30.08.02, and WPI 30.09.02)

In addition you should consider the following noneconomic damages elements:

(here insert appropriate elements from among phrases WPI 30.04-.06)

The burden of proving damages rests upon the plaintiff. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

Your award must be based upon evidence and not upon speculation, guess, or conjecture.

The law has not furnished us with any fixed standards by which to measure noneconomic damages. With reference to these matters you must be governed by your own judgment, by the evidence in the case, and by these instructions.

NOTE ON USE

See WPI Chapter 45 (Forms of Verdicts) for the appropriate verdict forms to be used with this instruction.

Use this instruction if there is no counterclaim and no issue of contributory negligence. Use WPI 30.02.01 (Measure of Economic and Noneconomic Damages—Personal Injury—Contributory Negligence—No Counterclaim) if there is an issue of contributory negligence.

Complete this instruction by inserting the appropriate elements of damages as directed in the instruction. The phrases inserted should reflect those elements of damages relevant to the action.

Delete the first two bracketed phrases of this instruction if there is a directed verdict or admitted liability. Use the third bracketed phrase if there are undisputed items of damages. If any of the bracketed phrases are deleted, practitioners may need to capitalize the first word that follows the deleted phrase.

In a case involving wanton misconduct, gross negligence, outrageous conduct, strict liability, or nuisance, substitute the particular term or term “wrongful conduct” for “negligence.”

If a cross-claim or third-party claim is asserted, the text of the instruction must be modified or WPI 41.05 (Counterclaim—Cross-Claim—Third-Party Claim) must be used, or both.

COMMENT

RCW 4.56.250.

Undisputed damages. In response to case law, the instruction states that jurors “must include” (rather than “should include”) undisputed damages in their verdict. See *Nichols v. Lackie*, 58 Wn.App. 904, 907, 795 P.2d 722 (1990) (jury failed to award the correct amount for undisputed special damages that were set forth in a damage instruction stating that the verdict “should include” designated special damage amounts). Jurors do not have discretion with respect to these items. *Hawkins v. Marshall*, 92 Wn.App. 38, 45, 962 P.2d 834 (1998); *Nichols*, 58 Wn.App. at 907.

Apportioning damages. The burden of proving the apportionment of damages between two negligent defendants rests with the defendants: “[O]nce a plaintiff has proved that each successive negligent defendant has caused some damage, the burden of proving allocation of those damages among themselves is upon the defendants; if the jury find[s] that the harm is indivisible, then the defendants are jointly and severally liable for the entire harm.” *Cox v. Spangler*, 141 Wn.2d 431, 443, 5 P.3d 1265 (2000); *Phennah v. Whalen*, 28 Wn.App. 19, 29, 621 P.2d 1304 (1980). For further discussion of apportioning damages, see WPI 41.04 (Fault to Be Apportioned).

Married co-plaintiffs. If there is a claim of injury by a married person, and the other spouse is joined as a plaintiff, the damage instruction and verdict forms should address the problem raised by *Brown v. Brown*, 100 Wn.2d 729, 675 P.2d 1207 (1984). *Brown* holds that recovery for an injury to a married person is the separate property of the injured spouse, except to the extent that the recovery compensates for lost wages that would have been community property, or an injury-related expense incurred. *Brown*, 100 Wn.2d at 730. *Brown* overruled the former case law that an injury recovery by a spouse is community property. *Brown*, 100 Wn.2d at 739. In order to properly reflect the law, the judgment for a particular item of tort recovery should be entered in favor of the spouse who owns that item of recovery or in favor of both as the case may be. Use of WPI 45.01 (General Verdict Forms—Single Plaintiff and Defendant) as though the marital community were a single plaintiff will no longer be sufficient. It may be necessary to set forth in WPI 30.01.01 the items of damage claimed by each spouse. The verdict form should direct the jury to make separate awards for the different items of damage involved so that proper judgments may be entered.

[Current as of April 2021.]

WPI 30.01.02

ECONOMIC DAMAGES—DEFINITION

(The WPI Committee recommends that no instruction be given on this subject.)

COMMENT

RCW 4.56.250(1)(a).

The statute defines economic damages as “objectively verifiable monetary losses, including medical expenses, loss of earnings, burial costs, loss of use of property, cost of replacement or repair, cost of obtaining substitute domestic services, loss of employment and loss of business or employment opportunities.”

The WPI Committee chose not to define economic damages for the jury. The WPI Committee believes a separate definition is not necessary because economic damages are defined by example in the general instructions on the measure of economic and noneconomic damages. See WPI 30.01.01 (Measure of Economic and Noneconomic Damages—Personal Injury—No Contributory Negligence), WPI 30.02.01 (Measure of Economic and Noneconomic Damages—Personal Injury—Contributory Negligence—No Counterclaim), and WPI 30.03.01 (Measure of Economic and Noneconomic Damages—Personal Injury—Counterclaim). The approach of not defining economic damages also eliminates speculation about the meaning of the term “objectively verifiable,” which is not defined by the statute.

If it is necessary to define economic damages for the jury, a possible definition, which avoids the use of “objectively verifiable,” would be: “Economic damages are monetary losses that are reasonably capable of being verified.”

There is no authority to support the proposition that economic damages includes only the types of damages specifically called out in the statute. The WPI Committee is satisfied that the word “includes” indicates that all “verifiable monetary losses” are recoverable, even if the type of loss is not specifically called out in the statute.

For instructions which define specific claims, see WPI 30.08.01 (Measure of Economic Damages—Elements of Past Damages—Loss of Earnings—Adult Plaintiff, Emancipated Minor, or Minor Whose Parent Has Waived Wage Claim) and WPI 30.08.02 (Measure of Economic Damages—Elements of Future Damages—Loss of Earnings—Adult Plaintiff,

Emancipated Minor, or Minor Whose Parent Has Waived Wage Claim) (both instructions include earning capacity as an element); WPI 30.09.01 (Measure of Economic Damages—Elements of Past Damages—Domestic Services/Nonmedical Expenses) and WPI 30.09.02 (Measure of Economic Damages—Elements of Future Damages—Domestic Services/Nonmedical Expenses) (both instructions include nonmedical expenses as an element); and WPI 30.10 (Measure of Damages—Damages to Personal Property—Repairs and Depreciation or Difference in Value Before and After Damage), WPI 30.11 (Measure of Damages—Damages to Personal Property—Repairs or Difference in Value Before and After Damage), WPI 30.12 (Measure of Damages—Damages to Personal Property—Cost of Repairs and Depreciation of Repaired Property), WPI 30.14 (Measure of Damages—Damages to Personal Property—Difference in Value Before and After Damage), and WPI 30.15 (Measure of Damages—Damages to Personal Property—Value Before Damage—No Salvage) (all are property damage instructions that include unlisted elements).

[Current as of April 2021.]

WPI 30.01.04

FUTURE DAMAGES—DEFINITION

(The WPI Committee recommends that no instruction be given on this subject.)

COMMENT

RCW 4.56.260.

The 1986 Tort Reform Act does not define future damages. However, RCW 4.56.260, enacted as part of that Act, requires the court at the request of a party to order periodic payments of future economic damages if those damages exceed one hundred thousand dollars. The possibility that such periodic payments may be requested necessitates that the jury separate past economic damages from future economic damages in making an award.

The WPI Committee thinks it unnecessary to define future damages for the jury because future damages are defined by example in the general instructions on the measure of economic and noneconomic damages. See WPI 30.01.01 (Measure of Economic and Noneconomic Damages—Personal Injury—No Contributory Negligence); WPI 30.02.01 (Measure of Economic and Noneconomic Damages—Personal Injury—Contributory Negligence—No Counterclaim); WPI 30.03.01 (Measure of Economic and Noneconomic Damages—Personal Injury—Counterclaim).

Burden of proof for future damages. Future damages must be based on evidence that, for example, the plaintiff will not be able to work in the future and not simply on an expert's assumption. See *Riccobono v. Pierce Cnty.*, 92 Wn.App 254, 268, 966 P. 2d 327 (1998) (constructive termination case). Expert testimony is not required. *Bitzan v. Parisi*, 88 Wn.2d 116, 123–26, 558 P.2d 775 (1977) (lay testimony by plaintiff of continuing pain and limitation of movement sufficient to support award for future damages). Once such evidence is before the jury, future damages are appropriate if the jury concludes that there is a “reasonable probability” that such damages will occur. Although the specific issue before the *Bitzan* court was a procedural question, the court approvingly cited the instructions given by the trial court as establishing that the plaintiff “had the burden of proving by the evidence in the case it was more probably true than not true that future disability, pain, suffering and loss of earnings would occur in the future with ‘reasonable probability.’” *Bitzan*, 88 Wn.2d at 118–19.

[Current as of April 2021.]

WPI 30.02

**MEASURE OF DAMAGES—PERSONAL AND
PROPERTY—CONTRIBUTORY NEGLIGENCE—NO
COUNTERCLAIM**

(WITHDRAWN)

[Current as of April 2021.]

WPI 30.02.01

**MEASURE OF ECONOMIC AND NONECONOMIC
DAMAGES—PERSONAL INJURY—CONTRIBUTORY
NEGLIGENCE—NO COUNTERCLAIM**

It is the duty of the court to instruct you as to the measure of damages. [By instructing you on damages the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for the plaintiff, then] you must first determine the amount of money required to reasonably and fairly compensate the plaintiff for the total amount of such damages as you find were proximately caused by the negligence of the defendant, apart from any consideration of contributory negligence.

[If you find for the plaintiff,] [your verdict must include the following undisputed items:

(here insert undisputed past economic damage amounts)

In addition,] you should consider the following past economic damages elements:

(here insert appropriate elements from among phrases WPI 30.07.01, WPI 30.08.01, WPI 30.09.01, and WPI 30.10-.16)

In addition you should consider the following future economic damages elements:

(here insert appropriate elements from among phrases WPI 30.07.02, WPI 30.08.02, and WPI 30.09.02)

In addition you should consider the following noneconomic damages elements:

(here insert appropriate elements from among phrases WPI 30.04–.06)

The burden of proving damages rests upon the plaintiff. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

Your award must be based upon evidence and not upon speculation, guess, or conjecture.

The law has not furnished us with any fixed standards by which to measure noneconomic damages. With reference to these matters you must be governed by your own judgment, by the evidence in the case, and by these instructions.

NOTE ON USE

See WPI Chapter 45 (Forms of Verdicts) for the appropriate verdict forms to be used with this instruction.

Use this instruction if there is no counterclaim but there is an issue of contributory negligence.

Complete this instruction by inserting the appropriate elements of damages as directed in the instruction. The phrases inserted should reflect those elements of damages relevant to the action.

Delete the first two bracketed phrases of this instruction if there is a directed verdict or admitted liability. Use the third bracketed phrase if there are undisputed items of damages. If some of the bracketed phrases are not used, practitioners may need to capitalize the first word that follows a bracketed phrase.

COMMENT

See the Comment to WPI 30.01.01 (Measure of Economic and Noneconomic Damages—Personal Injury—No Contributory Negligence).

[Current as of April 2021.]

WPI 30.03

MEASURE OF DAMAGES—PERSONAL AND
PROPERTY—COUNTERCLAIM

(WITHDRAWN)

[Current as of April 2021.]

WPI 30.03.01**MEASURE OF ECONOMIC AND NONECONOMIC
DAMAGES—PERSONAL INJURY—COUNTERCLAIM**

It is the duty of the court to instruct you as to the measure of damages. [By instructing you on damages the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for the plaintiff on plaintiff's claim, then] you must first determine the amount of money required to reasonably and fairly compensate the plaintiff for the total amount of such damages as you find were proximately caused by the negligence of the defendant, apart from any consideration of contributory negligence.

[If you find for the plaintiff,] [your verdict must include the following undisputed items:

(here insert undisputed past economic damage amounts)

In addition] you should consider the following past economic damages elements:

(here insert appropriate elements from among phrases WPI 30.07.01, WPI 30.08.01, WPI 30.09.01, and WPI 30.10–.16)

In addition you should consider the following future economic damages elements:

(here insert appropriate elements from among phrases WPI 30.07.02, WPI 30.08.02, and WPI 30.09.02)

In addition you should consider the following noneconomic damages elements:

(here insert appropriate elements from among phrases WPI 30.04–.06)

[If your verdict is for the defendant on defendant's claim, then] you must first determine the amount of money required to reasonably and fairly compensate the defendant for the total amount of such damages as you find were proximately caused by the negligence of the plaintiff, apart from any consideration of contributory negligence.

If you find for the defendant [your verdict must include the following undisputed items:

(here insert undisputed past economic damage amounts)

In addition] you should consider the following past economic damages elements:

(here insert appropriate elements from among phrases WPI 30.07.01, WPI 30.08.01, WPI 30.09.01, and WPI 30.10-.16)

In addition you should also consider the following future economic damages elements:

(here insert appropriate elements from among phrases WPI 30.07.02, WPI 30.08.02, and WPI 30.09.02)

In addition you should consider the following noneconomic damages elements:

(here insert appropriate elements from among phrases WPI 30.04-.06)

The burden of proving damages rests with the party claiming them. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

Your award must be based upon evidence and not upon speculation, guess, or conjecture.

The law has not furnished us with any fixed standards by which to measure noneconomic damages. With refer-

ence to these matters you must be governed by your own judgment, by the evidence in the case, and by these instructions.

NOTE ON USE

Use this instruction if there is a counterclaim. The WPI Committee recommends using a separate verdict form for the claim of the plaintiff and the counterclaim of the defendant. See WPI Chapter 45 (Forms of Verdicts) for the appropriate verdict forms to be used with this instruction.

Complete this instruction by inserting the appropriate elements of damages as directed in the instruction. The phrases inserted should reflect those elements of damages relevant to the action.

Delete the first two bracketed phrases of this instruction if there is a directed verdict or admitted liability. Use the third bracketed phrase if there are undisputed items of damages. If any of the bracketed phrases are deleted, practitioners may need to capitalize the first word that follows the deleted phrase.

COMMENT

See the Comment to WPI 30.01.01 (Measure of Economic and Noneconomic Damages—Personal Injury—No Contributory Negligence).

[Current as of April 2021.]

WPI 30.05

**MEASURE OF DAMAGES—ELEMENTS OF
NONECONOMIC DAMAGES—DISABILITY,
DISFIGUREMENT, AND LOSS OF ENJOYMENT OF
LIFE**

The [disability] [disfigurement] [loss of enjoyment of life] experienced and with reasonable probability to be experienced in the future.

NOTE ON USE

Insert this phrase as an element of noneconomic damages in the damage instruction (WPI 30.01.01, WPI 30.02.01, or WPI 30.03.01) if the evidence justifies its use.

Use bracketed material as applicable.

COMMENT

RCW 4.56.250(1)(b).

The statute defines noneconomic damages as subjective, nonmonetary losses, including, but not limited to, disability or disfigurement incurred by the injured party.

The statute fails to define the term “disability.” In *Parris v. Johnson*, 3 Wn.App. 853, 859–60, 479 P.2d 91 (1970), the court held that “disability” includes not only the incapacity to work but also impairment of the injured person’s ability to lead a normal life. Presumably, the Legislature intended that the term be used in this latter sense for purposes of noneconomic damages. Under some circumstances, it is not error to include the loss of enjoyment of life as an element of damage separate from disability. *Kirk v. Wash. State Univ.*, 109 Wn.2d 448, 461–62, 746 P.2d 285 (1987) (there is no overlap of recoveries when loss of enjoyment of life involves “loss of a specific unusual activity,” such as ballet dancing or “specific artistic or athletic skills”).

For a discussion relating to the burden of proof for future damages see the Comment to WPI 30.01.04 (Future Damages—Definition). For a general discussion of noneconomic damages, see the Comment to WPI 30.06 (Measure of Damages—Elements of Noneconomic Damages—Pain and Suffering—Past and Future).

[Current as of April 2021.]

WPI 30.06

**MEASURE OF DAMAGES—ELEMENTS OF
NONECONOMIC DAMAGES—PAIN AND
SUFFERING, ETC.—PAST AND FUTURE**

**The pain and suffering, [both mental and physical],
[and (fill in element from RCW 4.56.250(1)(b))]** experienced and with reasonable probability to be experienced in the future.

NOTE ON USE

Insert this phrase as an element of noneconomic damages in the damage instruction (WPI 30.01.01, WPI 30.02.01, or WPI 30.03.01) if the evidence justifies its use.

Use bracketed material as applicable. See the Comment below for a discussion relating to the types of noneconomic damages that may be inserted in the empty set of brackets in this instruction.

COMMENT

RCW 4.56.250(1)(b).

The statute. The statute defines noneconomic damages as “subjective, nonmonetary losses, including but not limited to pain, suffering, inconvenience, mental anguish, disability or disfigurement incurred by the injured party, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation, and destruction of the parent-child relationship.”

Instructions on elements of noneconomic damages in general. It has been a long-standing rule that a damages instruction must include all elements that are supported by the evidence. See *Bitzan v. Parisi*, 88 Wn.2d 116, 122, 558 P.2d 775 (1977); *Lofgren v. W. Wash. Corp. of Seventh Day Adventists*, 65 Wn.2d 144, 151, 396 P.2d 139 (1964); *McGarvey v. City of Seattle*, 62 Wn.2d 524, 531, 384 P.2d 127 (1963). The failure to include an element of damage in a jury instruction is reversible error when there is sufficient evidence to support it. See *Lofgren*, 65 Wn.2d at 151. Conversely, it is reversible error to include an element of damage in an instruction when there is no proof of that element. *Gosa v. Hyde*, 117 Wash. 672, 676–77, 202 P. 274 (1921).

Noneconomic damages are not susceptible of precise measurement, and evidence that assigns an actual dollar value to the injury or that

fixes the amount of damages with mathematical certainty is not required. *Razor v. Retail Credit Co.*, 87 Wn.2d 516, 531, 554 P.2d 1041 (1976); *Wagner v. Monteilh*, 43 Wn.App. 908, 912, 720 P.2d 847 (1986). See WPI 30.01.01 (Measure of Economic and Noneconomic Damages—Personal Injury—No Contributory Negligence).

Pain, suffering, inconvenience. Pain and suffering are grouped together as elements in personal injury cases. See *Green v. Floe*, 28 Wn.2d 620, 636–37, 183 P.2d 771 (1947). Future pain and suffering are also properly included in the elements instruction when there is sufficient evidence to support the instruction. *Bitzan*, 88 Wn.2d at 121 (lay testimony was sufficient to support an instruction on future disability, pain, suffering, etc.); *Orme v. Watkins*, 44 Wn.2d 325, 330–34, 267 P.2d 681 (1954); *Lieske v. Natsuhara*, 165 Wash. 270, 272–73, 5 P.2d 307 (1931).

“Inconvenience” is included as a compensable item of non-economic damages in RCW 4.56.250(1)(b).

Damages for injuries to a spouse, domestic partner, parent, or child. Many of the noneconomic damage elements listed in RCW 4.56.250(1)(b) are covered in the instructions found in WPI Chapter 32 (Damages—Injury to Spouse, Domestic Partner, Parent, or Child), the damage instructions for injuries to a spouse, domestic partner, parent, or child. Loss of society and companionship is covered in WPI 32.05 (Measure of Damages—Loss of Consortium—Parent) and WPI 32.06.01 (Measure of Damages—Injury to Child—Action Brought by Parent or Legal Guardian (RCW 4.24.010)). Loss of consortium is covered by WPI 32.04 (Measure of Damages—Loss of Consortium—Spouse/State Registered Domestic Partner) and WPI 32.05 (Measure of Damages—Loss of Consortium—Parent). Destruction of the parent-child relationship is covered in WPI 32.06.01 (Measure of Damages—Injury to Child—Action Brought by Parent or Legal Guardian (RCW 4.24.010)).

Disability, disfigurement, and loss of enjoyment of life. See WPI 30.05 (Measure of Damages—Elements of Noneconomic Damages—Disability, Disfigurement, and Loss of Enjoyment of Life).

Injury to reputation and humiliation. Injury to reputation as an element of damage is most common in actions for slander or false arrest or actions brought under the Consumer Protection Act. See *Wash. State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 315, 858 P.2d 1054, 1062 (1993) (injury to reputation is compensable under the CPA); *Roper v. Mabry*, 15 Wn.App. 819, 823–25, 551 P.2d 1381 (1976) (discusses injury to reputation in a slander case); *Wilson v. City of Walla Walla*, 12 Wn.App. 152, 153–54, 528 P.2d 1006 (1974)

(discusses injury to reputation in a false arrest case). The WPI Committee is unaware of any Washington cases addressing injury to reputation as an element of damage in a personal injury case.

Humiliation may be included as an element of damage in personal injury cases, especially those involving intentional torts. See *Carmody v. Trianon Co.*, 7 Wn.2d 226, 233, 109 P.2d 560 (1941) (stating that humiliation is a proper element of damage in an action based upon assault and battery); *Hickman v. Desimone*, 188 Wash. 499, 502-03, 62 P.2d 1338 (1936); see also RCW 4.20.046 (general survival statute, which allows personal representative to recover a decedent's humiliation damages on behalf of certain specified statutory beneficiaries).

Future damages. For a discussion relating to the burden of proof for future damages see the Comment to WPI 30.01.04 (Future Damages—Definition).

[Current as of April 2021.]

WPI 30.07

**MEASURE OF DAMAGES—ELEMENTS OF
DAMAGES—MEDICAL EXPENSE—PAST AND
FUTURE**

(WITHDRAWN)

[Current as of April 2021.]

WPI 30.07.01

**MEASURE OF ECONOMIC DAMAGES—ELEMENTS
OF PAST DAMAGES—MEDICAL EXPENSES**

The reasonable value of necessary medical care, treatment, and services received to the present time.

NOTE ON USE

Insert this phrase as an element of past economic damages section in the damage instruction (WPI 30.01.01, WPI 30.02.01, or WPI 30.03.01) if the evidence justifies its use.

The reference to “medical care, treatment, and services” may be replaced by specific references to particular types of treatment or services. For example: “doctor’s care”; “hospital care”; “nursing care”; “treatment and services”; etc.

If the plaintiff presents sufficient evidence establishing the reasonable value and necessity of plaintiff’s past medical care, treatment, and services, and the defendant elicits no controverting evidence, then the uncontroverted reasonable value of that medical care, treatment and services should be listed as an undisputed line item on the damages instruction to be given (WPI 30.01.01, WPI 30.02.01, or WPI 30.03.01).

COMMENT

RCW 4.56.250(1)(a).

The statute defines economic damages in part as “objectively verifiable monetary losses, including medical expenses.”

Medical expenses must be both reasonable and necessary to be recovered as damages. See *Palmer v. Jensen*, 132 Wn.2d 193, 199, 937 P.2d 597 (1997). Medical expenses are not reasonable and necessary if they are attributable to an event other than the defendant’s negligent act or if they are due to exaggerated injuries. *Kadmiri v. Claassen*, 103 Wn.App. 146, 151, 10 P.3d 1076 (2000); *Hawkins v. Marshall*, 92 Wn.App. 38, 45–46, 962 P.2d 834 (1998); cf. *Lindquist v. Dengel*, 92 Wn.2d 257, 262–63, 595 P.2d 934 (1979) (a defendant who injures another may be liable not only for the defendant’s own negligence, but also for a doctor’s subsequent negligence in treating the injuries).

The burden of proving the reasonableness and necessity of medical

expenses rests with the plaintiff. See *Patterson v. Horton*, 84 Wn.App. 531, 543, 929 P.2d 1125 (1997). To prove the reasonableness and necessity of past medical expenses, the plaintiff may not rely solely on his or her own testimony as to amounts incurred. See *Nelson v. Fairfield*, 40 Wn.2d 496, 501, 244 P.2d 244 (1952); *Torgeson v. Hanford*, 79 Wash. 56, 59, 139 P. 648 (1914). Nor can the plaintiff rely solely on medical records and bills. *Patterson*, 84 Wn.App. at 543; *Carr v. Martin*, 35 Wn.2d 753, 762, 215 P.2d 411 (1950). “[M]edical records and bills are relevant to prove past medical expenses only if supported by additional evidence that the treatment and the bills were both necessary and reasonable.” *Patterson*, 84 Wn.App. at 543.

As the court in *Hayes v. Wieber Enterprises, Inc.*, 105 Wn.App. 611, 616, 20 P.3d 496 (2001), stated (referencing former WPI 30.07, which used the same language as WPI 30.07.01): “And the amount actually billed or paid is not itself determinative. The question is whether the sums requested for medical services are reasonable.”

Generally, expert testimony will be necessary to establish the reasonableness and necessity of medical expenses. See *Hills v. King*, 66 Wn.2d 738, 741, 404 P.2d 997 (1965) (noting that the “medical testimony” was uncontroverted that plaintiff’s medical expenses were reasonable and necessary, resulting from the accident); *Lakes v. Vondermehden*, 117 Wn.App. 212, 219, 70 P.3d 154 (2003) (suggesting that in the absence of an admission by defendant that certain medical expenses were reasonable and necessary, expert testimony would be needed).

When the plaintiff presents sufficient evidence establishing the reasonableness and necessity of his or her medical treatment and expenses, and the defendant elicits no controverting evidence, the reasonableness and necessity of plaintiff’s medical expenses are not a matter of legitimate dispute. *Palmer*, 132 Wn.2d at 199–200; *Ide v. Stoltenow*, 47 Wn.2d 847, 851, 289 P.2d 1007 (1955).

[Current as of April 2021.]

WPI 30.08

**MEASURE OF DAMAGES—ELEMENTS OF
DAMAGES—LOSS OF EARNINGS—PAST AND
FUTURE—ADULT PLAINTIFF, EMANCIPATED
MINOR, OR MINOR WHOSE PARENT HAS WAIVED
WAGE CLAIM**

(WITHDRAWN)

[Current as of April 2021.]

WPI 30.08.01

**MEASURE OF ECONOMIC DAMAGES—ELEMENTS
OF PAST DAMAGES—LOSS OF EARNINGS—ADULT
PLAINTIFF, EMANCIPATED MINOR, OR MINOR
WHOSE PARENT HAS WAIVED WAGE CLAIM**

**The reasonable value of [earnings] [earning capacity]
[employment] [salaries] [business opportunities] [employ-
ment opportunities] lost to the present time.**

NOTE ON USE

Insert this phrase as an element of past economic damages in the damage instruction (WPI 30.01.01, WPI 30.02.01, or WPI 30.03.01) if the evidence justifies its use.

Care must be exercised to distinguish between lost earnings and lost earning capacity in order to avoid erroneous duplication of elements. See the Comment below.

Use bracketed material as applicable.

COMMENT

RCW 4.56.250(1)(a).

The statute defines economic damages in part as objectively verifiable monetary losses, including loss of earnings, loss of employment, and loss of business or employment opportunities.

This instruction includes the bracketed words “earning capacity,” which do not appear in the statute. RCW 4.56.250(1)(a) defines economic damages as “including” a list of objectively verifiable monetary losses, while the following subsection of the statute, RCW 4.56.250(1)(b) defines noneconomic damages as “including, but not limited to” a list of subjective, nonmonetary losses. The WPI Committee concluded the Legislature did not intend the listing in RCW 4.56.250(1)(a) to be exclusive and that lost earning capacity should be included in this instruction because of the case law support for such damages. See the cases cited below in this Comment. For a general discussion of economic damages, see the Comment to WPI 30.01.02 (Economic Damages—Definition).

Loss of earning capacity is an appropriate element of damages under the Tort Reform Act, when supported by the evidence. In Chapple

v Granger, 851 F.Supp 1481 (E.D.Wash. 1994), the court, applying Washington law, concluded that lost earning capacity is an element of damages. See generally DeWolf & Allen, 16 Washington Practice, Tort Law and Practice § 6.5 (5th ed.).

There are a number of pre-Tort Reform Act cases concluding that loss of earning capacity is an appropriate element of damage when the evidence supports a conclusion that the injury will result in a permanent diminution of the ability to earn money. See, e.g., *Sherman v. City of Seattle*, 57 Wn.2d 233, 245–46, 356 P.2d 316 (1960) (loss of earning capacity proper element of damages for a three-year old child who lost an arm between the elbow and shoulder); *Murray v. Mossman*, 52 Wn.2d 885, 889–90, 329 P.2d 1089 (1958) (loss of earning capacity for secretary who suffered from loss of sensation in arm and testified that her efficiency was impacted). For a discussion of the issue of loss earning capacity in the context of a small business, see *Kennard v. Kaelin*, 58 Wn.2d 524, 525–26, 364 P.2d 446 (1961) (Loss of profits from small business).

Impairment of earning capacity is different from loss of wages. It is the permanent diminution of the ability to earn money. *Murray*, 52 Wn.2d at 889. Care must be taken in drafting the jury instruction if both impairment of earning capacity and loss of future wages are being sought to avoid duplication of this element. *Meissner v. City of Seattle*, 14 Wn.App. 457, 471, 542 P.2d 795 (1975).

[Current as of April 2021.]

WPI 30.09

MEASURE OF DAMAGES—ELEMENTS OF
DAMAGES—HOUSEHOLD EXPENSES—PAST AND
FUTURE

(WITHDRAWN)

[Current as of April 2021.]

WPI 30.09.01**MEASURE OF ECONOMIC DAMAGES—ELEMENTS
OF PAST DAMAGES—DOMESTIC SERVICES/
NONMEDICAL EXPENSES**

The reasonable value of necessary [substitute domestic services] [nonmedical expenses] [————] that have been required to the present time.

NOTE ON USE

Insert this phrase as an element of past economic damages in the damage instruction (either WPI 30.01.01, WPI 30.02.01, or WPI 30.03.01) if the evidence justifies its use.

Use bracketed material as applicable. See Comment below for a discussion related to other economic damages.

COMMENT

RCW 4.56.250(1)(a).

The statute defines economic damages in part as objectively verifiable monetary losses, including the cost of obtaining substitute domestic services.

This instruction includes the bracketed words “nonmedical expenses,” which do not appear in the statute, as well as an empty set of brackets to be used as appropriate. It has not yet been conclusively determined whether monetary losses other than those listed in RCW 4.56.250(1)(a) may be considered in awarding economic damages. RCW 4.56.250(1)(a) defines economic damages as “including” a list of objectively verifiable monetary losses, while the following subsection of the statute, RCW 4.56.250(1)(b), defines noneconomic damages as “including, but not limited to” a list of subjective, nonmonetary losses. The WPI Committee concluded the Legislature did not intend the listing in RCW 4.56.250(1)(a) to be exclusive and that it is appropriate to instruct on other objectively verifiable nonmedical expenses in addition to substitute domestic services in this instruction (e.g., remodeling a home to accommodate a wheelchair). See generally the Comment to WPI 30.01.02 (Economic Damages—Definition).

Recovery for the reasonable value of services gratuitously rendered by a member of the family is permitted. *Howells v. N. Am. Transp. &*

Trading Co., 24 Wash. 689, 694-95, 64 P. 786 (1901) (proper measure of damages is the reasonable value of the services rendered by the family member, not the value of the family member's lost time from own business). See also Connelly, Annotation, Damages for Personal Injury or Death as Including Value of Care and Nursing Grateuitously Rendered, 90 A.L.R.2d 1323 (1963).

[Current as of April 2021.]

WPI 30.10**MEASURE OF DAMAGES—DAMAGE TO PERSONAL
PROPERTY—REPAIRS AND DEPRECIATION OR
DIFFERENCE IN VALUE BEFORE AND AFTER
DAMAGE**

The lesser of the following:

- 1. The reasonable value of necessary repairs to any property that was damaged plus the difference between the fair cash market value of the property immediately before the occurrence and its fair cash market value after it is repaired; or**
- 2. The difference between the fair cash market value of the property immediately before the occurrence and the fair cash market value of the unrepaired property immediately after the occurrence.**

NOTE ON USE

Insert this phrase as an element of economic damage in the appropriate damage instruction (WPI 30.01.01, WPI 30.02.01, or WPI 30.03.01) when the evidence justifies its use.

If there is no claim that the property has depreciated in value after it is repaired, use WPI 30.11 (Measure of Damages—Damage to Personal Property—Repairs or Difference in Value Before and After Damage).

If the cost of repairs plus depreciation will be less than the difference in value between the damaged and undamaged property, use WPI 30.12 (Measure of Damages—Damage to Personal Property—Cost of Repairs and Depreciation of Repaired Property).

If only the reasonable expense of necessary repairs is claimed and that is less than the difference in value of the property before and after the damage, use WPI 30.13 (Measure of Damages—Damage to Personal Property—Repairs).

If the difference in the value of property before and after it was damaged is less than the reasonable cost of repairs, use WPI 30.14 (Mea-

sure of Damages—Damage to Personal Property—Difference in Value Before and After Damage).

If the claim is for a building or personal property that was completely destroyed and has no salvage value, do not use this instruction. Instead, use WPI 30.15 (Measure of Damages—Damage to Personal Property—Value Before Damage—No Salvage).

This instruction may not be appropriate for damages to real estate or improvements thereon.

COMMENT

RCW 4.56.250(1)(a).

The statute defines economic damages as including both “loss of use of property” and “cost of replacement and repair.” Other traditional methods for measuring property damages may also be considered as “economic damages.” See the Comment accompanying WPI 30.01.02 (Economic Damages—Definition).

A reduction in the value of damaged property may be included as an element of damages when that element is supported by the evidence. Cf. *Kaech v. Lewis Cnty. Pub. Util. Dist. No. 1*, 106 Wn.App. 260, 269–70, 23 P.3d 529, 91 A.L.R.5th 727 (2001) (instruction including this element of damages). On the question of a market for the particular property in question, see *McCurdy v. Union Pac. R.R. Co.*, 68 Wn.2d 457, 467–69, 413 P.2d 617 (1966).

In an action to recover damages for a building completely destroyed through negligence, the court held that the “lesser than” rule for measure of damages, comparing reasonable value of repairs against diminution in fair cash value, did not apply. *Thompson v. King Feed & Nutrition Serv., Inc.*, 153 Wn.2d 447, 458–59, 105 P.3d 378 (2005). The court also held that the value of the lost building did not include the value of any uninjured real property that might be attached to the personal property. *Thompson*, 153 Wn.2d at 459.

[Current as of April 2021.]

WPI 30.11

**MEASURE OF DAMAGES—DAMAGE TO PERSONAL
PROPERTY—REPAIRS OR DIFFERENCE IN VALUE
BEFORE AND AFTER DAMAGE**

The lesser of the following:

1. The reasonable value of necessary repairs to any property that was damaged; or
2. The difference between the fair cash market value of the property immediately before the occurrence and the fair cash market value of the unrepaired property immediately after the occurrence.

NOTE ON USE

Insert this phrase as an element of economic damages in the appropriate damage instruction (WPI 30.01.01, WPI 30.02.01, or WPI 30.03.01) when the evidence justifies its use.

This instruction is to be used when there is an issue as to whether the cost of repairs or the difference in value of the property before and after it is damaged is the lesser amount. When the cost of repairs is admittedly the lesser amount, use WPI 30.13 (Measure of Damages—Damages to Personal Property—Repairs); when the converse is true, use WPI 30.14 (Measure of Damages—Damage to Personal Property—Difference in Value Before and After Damage).

If the claim is for a building or personal property that was completely destroyed and has no salvage value, do not use this instruction. Instead, use WPI 30.15 (Measure of Damages—Damages to Personal Property—Value Before Damage—No Salvage).

This instruction may not be appropriate for damages to real estate or improvements thereon.

COMMENT

RCW 4.56.250(1)(a).

The statute defines economic damages as including both “loss of use of property” and “cost of replacement and repair.” Other traditional

methods for measuring property damage may also be considered as “economic damages.” See the Comment accompanying WPI 30.01.02 (Economic Damages—Definition).

In an action to recover damages for a building completely destroyed through negligence, the court held that the “lesser than” rule for measure of damages, comparing reasonable value of repairs against diminution in fair cash value, did not apply. *Thompson v. King Feed & Nutrition Serv., Inc.*, 153 Wn.2d 447, 458–59, 105 P.3d 378 (2005). The court also held that the value of the lost building did not include the value of any uninjured real property that might be attached to the personal property. *Thompson*, 153 Wn.2d at 459.

For related discussion, see the Note on Use and Comment to WPI 30.10 (Measure of Damages—Damages to Personal Property—Repairs and Depreciation or Difference in Value Before and After Damage).

[Current as of April 2021.]

WPI 30.12**MEASURE OF DAMAGES—DAMAGE TO PERSONAL
PROPERTY—COST OF REPAIRS AND
DEPRECIATION OF REPAIRED PROPERTY**

The reasonable value of necessary repairs to any property that was damaged plus the difference between the fair cash market value of the property immediately before the occurrence and its fair cash market value after it is repaired.

NOTE ON USE

Insert this phrase as an element of damage in the appropriate damage instruction (WPI 30.01.01, WPI 30.02.01, or WPI 30.03.01) when the evidence justifies its use.

If only the reasonable value of necessary repairs is claimed, use WPI 30.13 (Measure of Damages—Damage to Personal Property—Repairs).

If the claim is for a building or personal property that was completely destroyed and has no salvage value, do not use this instruction. Instead, use WPI 30.15 (Measure of Damages—Damage to Personal Property—Value Before Damage—No Salvage).

COMMENT

RCW 4.56.250(1)(a).

The statute defines economic damages as including both “loss of use of property” and “cost of replacement and repair.” Other traditional methods for measuring property damage may also be considered as “economic damages.” See the Comment accompanying WPI 30.01.02 (Economic Damages—Definition).

In an action to recover damages for a building completely destroyed through negligence, the court held that the “lesser than” rule for measure of damages, comparing reasonable value of repairs against diminution in fair cash value, did not apply. *Thompson v. King Feed & Nutrition Serv., Inc.*, 153 Wn.2d 447, 458–59, 105 P.3d 378 (2005). The court also held that the value of the lost building did not include the value of any uninjured real property that might be attached to the personal property. *Thompson*, 153 Wn.2d at 459.

For related discussion, see the Note on Use and Comment to WPI 30.10 (Measure of Damages—Damage to Personal Property—Repairs and Depreciation or Difference in Value Before and After Damage).

[Current as of April 2021.]

WPI 30.13**MEASURE OF DAMAGES—DAMAGE TO PERSONAL
PROPERTY—REPAIRS**

The reasonable value of necessary repairs to any property that was damaged.

NOTE ON USE

Insert this phrase as an element of economic damage in the appropriate damage instruction (WPI 30.01.01, WPI 30.02.01, or WPI 30.03.01) when the evidence justifies its use.

If the claim is for a building or personal property that was completely destroyed and has no salvage value, do not use this instruction. Instead, use WPI 30.15 (Measure of Damages—Damage to Personal Property—Value Before Damage—No Salvage).

COMMENT

RCW 4.56.250(1)(a):

The statute defines economic damages as including “cost of replacement and repair.”

In a malicious mischief prosecution, the cost of repairs is within the “ordinary meaning” of damages, and thus the language concerning the cost of repairs from WPI 30.13 was properly included in instructions to the jury. *State v. Ratliff*, 46 Wn.App. 325, 328–29, 730 P.2d 716 (1986); see also *Bader v. Marlin*, 160 Wash. 460, 463, 295 P. 160 (1931); *Evers v. Broadview Dairy Co.*, 147 Wash. 570, 572–73, 266 P. 726 (1928).

In an action to recover damages for a building completely destroyed through negligence, the court held that the “lesser than” rule for measure of damages, comparing reasonable value of repairs against diminution in fair cash value, did not apply. *Thompson v. King Feed & Nutrition Serv., Inc.*, 153 Wn.2d 447, 558–59, 105 P.3d 378 (2005). The court also held that the value of the lost building did not include the value of any uninjured real property that might be attached to the personal property. *Thompson*, 153 Wn.2d at 459.

[Current as of April 2021.]

WPI 30.17

AGGRAVATION OF PRE-EXISTING CONDITION

If [your verdict is in favor of the [plaintiff] [defendant], and if] you find that:

- (1) before this occurrence the [plaintiff] [defendant] had a pre-existing [bodily] [mental] condition that was causing pain or disability; and
- (2) because of this occurrence the condition or the pain or the disability was aggravated,

then you should consider the degree to which the condition or the pain or disability was aggravated by this occurrence.

However, you should not consider any condition or disability that may have existed prior to this occurrence, or from which the [plaintiff] [defendant] may now be suffering, that was not caused or contributed to by this occurrence.

NOTE ON USE

Use bracketed material as applicable. In a directed or admitted liability case, omit the bracketed phrase "if your verdict is in favor of."

Do not use this instruction as an insert in the damage instruction. It is intended for use as an explanatory instruction if the evidence warrants it.

Use this instruction if the pre-existing condition was causing pain or disability. If the pre-existing condition was merely an infirmity that was not causing pain or disability, use WPI 30.18 (Previous Infirm Condition) or WPI 30.18.01 (Particular Susceptibility). If the evidence is in dispute as to the existence of such pre-existing pain or disability, use both instructions.

COMMENT

This instruction deals with proximate cause. It is not a separate element of damage but it is placed here for convenience.

It is improper to give an instruction of this nature if there is no evidence that any pain or disability was being caused by the pre-existing condition prior to the occurrence. *Greenwood v. Olympic, Inc.*, 51 Wn.2d 18, 23, 315 P.2d 295 (1957); *Reeder v. Sears, Roebuck & Co.*, 41 Wn.2d 550, 557, 250 P.2d 518 (1952).

Use of WPI 30.18 (Previous Infirm Condition) and refusal of this instruction was approved in an action in which there was evidence of a pre-existing condition but insufficient evidence that it was causing pain or disability. *Sutton v. Shufelberger*, 31 Wn.App. 579, 583–84, 643 P.2d 920 (1982). Use of WPI 30.17 and WPI 30.18 together was approved in an action in which there was a dispute whether the plaintiff's pre-existing condition was dormant or active at the time of the accident. *Thogerson v. Heiner*, 66 Wn.App. 466, 472–75, 832 P.2d 508 (1992); *Bowman v. Whitelock*, 43 Wn.App. 353, 358–59, 717 P.2d 303 (1986).

This instruction includes pre-existing mental conditions in addition to pre-existing bodily conditions. See *Xieng v. Peoples Nat'l Bank of Wash.*, 63 Wn.App. 572, 582–83, 821 P.2d 520 (1991) (finding liability notwithstanding the plaintiff's pre-existing post-traumatic stress disorder).

[Current as of April 2021.]

WPI 30.18

PREVIOUS INFIRM CONDITION

If [your verdict is for the [plaintiff] [defendant], and if] you find that:

- (1) before this occurrence the [plaintiff] [defendant] had a [bodily] [mental] condition that was not causing pain or disability; and
- (2) because of this occurrence the pre-existing condition was lighted up or made active,

then you should consider the lighting up and any other injuries that were proximately caused by the occurrence, even though those injuries, due to the pre-existing condition, may have been greater than those that would have been incurred under the same circumstances by a person without that condition.

[There may be no recovery, however, for any injuries or disabilities that would have resulted from natural progression of the pre-existing condition even without this occurrence.]

NOTE ON USE

Use bracketed material as applicable. When liability is directed or admitted, omit the first bracketed phrase.

Use this instruction for a pre-existing condition that was not causing pain or disability. If the pre-existing condition was painful or disabling before the event on which the claim is based, use WPI 30.17 (Aggravation of Pre-Existing Condition). When the evidence is disputed as to the existence of such pre-existing pain or disability, use both instructions.

If the pre-existing condition was a susceptibility that caused more serious consequences, rather than a dormant condition lighted up by the occurrence, use WPI 30.18.01 (Particular Susceptibility).

Use the last bracketed sentence only if the evidence would support

a finding that some of the resulting injury would have resulted from natural progression of the condition even without the occurrence.

Do not use this instruction as an insert in the damage instruction. It is intended as a separate explanatory instruction if the evidence warrants it.

COMMENT

This instruction deals with proximate cause. It does not define a separate element of damage, but it is placed here for convenience. In previous editions, WPI 30.18 also dealt with injuries sustained by reason of a person's particular susceptibility, in traditional parlance, the "eggshell plaintiff." For clarity and better comprehension, the susceptibility concept is now set forth as a separate instruction, WPI 30.18.01 (Particular Susceptibility).

If there is no evidence that a pre-existing bodily condition was causing pain or disability before the occurrence, then the defendant is liable for the aggravation of that condition as well as other damages proximately caused to the person in that condition. See *Bennett v. Messick*, 76 Wn.2d 474, 478-79, 457 P.2d 609 (1969); *Greenwood v. Olympic, Inc.*, 51 Wn.2d 18, 23, 315 P.2d 295 (1957); *Reeder v. Sears, Roebuck & Co.*, 41 Wn.2d 550, 556-57, 250 P.2d 518 (1952).

The last sentence of this instruction was cited with approval in *Hoskins v. Reich*, 142 Wn.App. 557, 174 P.3d 1250 (2008). The court stated that "this sentence should only be used 'if the evidence would support a finding that some of the resulting injury would have resulted from natural progression of the condition even without the occurrence.'" *Hoskins*, 142 Wn.App. at 568 n.6 (quoting WPI 30.18).

For additional discussion, see the Comment to WPI 30.17 (Aggravation of Pre-Existing Condition).

[Current as of April 2021.]

CHAPTER 31

DAMAGES—WRONGFUL DEATH AND SURVIVAL ACTIONS

WPI 31.00	Introduction
WPI 31.01	Action by Personal Representative
WPI 31.01.01	Measure of Damages—Survival Action—Statutory Beneficiaries
WPI 31.01.02	Measure of Damages—Survival Action—No Statutory Beneficiaries
WPI 31.02	Measure of Damages—Wrongful Death—RCW 4.20.010—Action for Benefit of Spouse
WPI 31.02.01	Measure of Damages—Wrongful Death—Action for Benefit of Spouse / State Registered Domestic Partner
WPI 31.03	Measure of Damages—Wrongful Death—RCW 4.20.010—Action for Benefit of Child or Dependent Parent, Brother or Sister
WPI 31.03.01	Measure of Damages—Wrongful Death—Action for Benefit of Children/Stepchildren
WPI 31.03.02	Measure of Damages—Wrongful Death—Action for Benefit of Parent, Brother, or Sister
WPI 31.05	Action for Wrongful Death by Personal Representative
WPI 31.06	Measure of Damages—Wrongful Death of Child Brought by Parent—RCW 4.20.010
WPI 31.06.01	Measure of Damages—Wrongful Death Actions Brought by Parent for Death of Child—RCW 4.24.010
WPI 31.07	Wrongful Death and Survival Actions—No Contributory Negligence—Special Verdict Form
WPI 31.07.01	Wrongful Death and Survival Actions—Contributory Negligence—Special Verdict Form

WPI 31.00

INTRODUCTION

Washington has two statutes on wrongful death actions—a general wrongful death statute (RCW 4.20.010, in conjunction with RCW 4.20.020) and a “child injury or death” statute applying to parents’ action for the death of a child (RCW 4.24.010). Washington also has two statutes on survival actions—a general survival statute (RCW 4.20.046) and a special survival statute (RCW 4.20.060).

Each of these statutes is discussed in more detail in the Comments to the individual instructions contained in this chapter. For general overviews of these statutes, see generally DeWolf & Allen, 16 Washington Practice, Tort Law and Practice §§ 7:2, 7:4 (5th ed.).

The causes of action for wrongful death and survival may overlap in a particular case. When a case involves both causes of action, care must be taken to avoid allowing a double recovery. See the discussion in the Comment to WPI 31.01.01 (Measure of Damages—Survival Action—Statutory Beneficiaries).

[Current as of April 2021.]

WPI 31.01

ACTION BY PERSONAL REPRESENTATIVE

Plaintiff (name of personal representative), **as personal representative of the estate of** (name of decedent), **brings two separate legal claims on behalf of the estate:**

- 1. In one claim [he] [she] represents the estate for the personal losses suffered by** (name of decedent); **and**
- 2. In the other claim [he] [she] represents the estate for the losses suffered by the beneficiaries of the estate,** (names of beneficiaries).

NOTE ON USE

This is not a damage instruction. This instruction may be used as a separate instruction or an advance oral instruction in a case that involves both wrongful death and survival claims for personal injury. If a case involves only one of these claims, the instruction should be modified accordingly.

For claims under the “child injury or death” statute, RCW 4.24.010, the instruction may need to be modified to indicate that the parents as well as the personal representative are the plaintiffs.

COMMENT

RCW 4.20.010 (wrongful death statute), RCW 4.20.046 (general survival statute), and RCW 4.20.060 (special survival statute).

When the death of a person is caused by the wrongful act, neglect, or default of another, RCW 4.20.010 permits the decedent’s personal representative to maintain an action for damages against the person causing the death on behalf of beneficiaries designated in the statute. RCW 4.20.060 provides that an action for personal injury may be prosecuted by the decedent’s executor or administrator in favor of designated beneficiaries if the injuries sustained caused the decedent’s death. RCW 11.02.005 provides that the term “personal representative” includes executor, administrator, special administrator, guardian or limited guardian, and special representative.

An action under RCW 4.20.020 and RCW 4.20.060 must be brought

by the personal representative of the deceased. The parents or grandparents of the deceased may not bring the action on their own. See *Benoy v. Simons*, 66 Wn.App. 56, 831 P.2d 167 (1992) (summary judgment dismissing the action was upheld because no personal representative had been appointed for the deceased's estate). By comparison, an action brought under the "child injury or death" statute may be brought by the child's parents. See *Benoy*, 66 Wn.App. at 61; WPI 31.06.01 (Measure of Damages—Wrongful Death Actions Brought By Parent for Death of Child—RCW 4.24.010).

[Current as of April 2021.]

WPI 31.01.01

MEASURE OF DAMAGES—SURVIVAL ACTION—
STATUTORY BENEFICIARIES

It is the duty of the court to instruct you as to the measure of damages on the plaintiff's claim for personal losses suffered by (name of decedent). [By instructing you on damages, the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for the plaintiff, then] you must determine the amount of money that will reasonably and fairly compensate (name of decedent)'s estate for such damages as you find were proximately caused by the negligence of the defendant.

[If you find for the plaintiff] [your verdict must include the following undisputed items:

(insert undisputed items and amounts)

In addition] you should consider the following items:

[1. Economic damages:]

[(a)][1.] The health care and funeral expenses that were reasonably and necessarily incurred.

[(b)][2.] The net accumulations lost to [his] [her] estate. In determining the net accumulations, you should take into account (name of decedent)'s age, health, life expectancy, occupation, and habits of industry, responsibility, and thrift. You should also take into account (name of decedent)'s earning capacity, including [his] [her] actual earnings prior to death and the earnings that reasonably would have been ex-

pected to be earned by [him] [her] in the future, including any pension benefits. Further, you should take into account the amount you find that (name of decedent) reasonably would have consumed as personal expenses [or reasonably would have contributed to (names of beneficiaries) during [his] [her] lifetime] and deduct this from [his] [her] expected future earnings to determine the net accumulations.

[2. Noneconomic damages:]

The [pain,] [suffering,] [anxiety,] [emotional distress,] [humiliation,] [and] [fear] experienced by [him] [her] prior to [his] [her] death as a result of (describe event).

The burden of proving damages rests upon the plaintiff. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

Your award must be based upon evidence and not upon speculation, guess, or conjecture.

The law has not furnished us with any fixed standards by which to measure noneconomic damages. With reference to these matters you must be governed by your own judgment, by the evidence in the case, and by these instructions.

NOTE ON USE

Use this instruction for survival actions (brought under RCW 4.20.046 or RCW 4.20.060) that involve statutory beneficiaries. For such actions, use this instruction in conjunction with the applicable instruction from this chapter on wrongful death damages. See WPI 31.02.01–31.03.02.

For survival actions not involving statutory beneficiaries, use WPI 31.01.02 (Measure of Damages—Survival Action—No Statutory Beneficiaries) instead of this instruction.

Use bracketed material as applicable. If some of the bracketed phrases are deleted, practitioners may need to capitalize the first word that follows the deleted phrase.

Do not use the bracketed paragraph on noneconomic damages in cases involving instantaneous death. For further discussion of this issue, see the Comment below.

COMMENT

RCW 4.20.046 and RCW 4.20.060.

Along with the wrongful death statutes, the general and special survival statutes, RCW 4.20.046 and RCW 4.20.060, were amended effective July 28, 2019. The amendments are remedial and retroactive and apply “to all claims that are not time-barred, as well as any claims pending in any court on July 28, 2019.” Laws 2019, Chapter 159, § 6. Under the amended RCW 4.20.020, parents and siblings of the decedent are no longer required to demonstrate financial dependence on the decedent in order to potentially recover economic and non-economic damages. They also may recover if they do not reside in the United States. These changes to the beneficiary structure are incorporated into the amended RCW 4.20.046 and RCW 4.20.060. See Note on Use to WPI 31.03.02 (Measure of Damages—Wrongful Death—Action for Benefit of Parent, Brother, or Sister); see generally DeWolf & Allen, 16 Washington Practice, Tort Law and Practice §§ 7:2, 7:4 (5th ed.).

Survival statutes. The general survival statute, RCW 4.20.046, provides in relevant part that “[a]ll causes of action by a person . . . against another person . . . shall survive to the personal representatives of the former and against the personal representatives of the latter . . .” A 1993 amendment to the statute allows damages for “pain and suffering, anxiety, emotional distress, or humiliation,” but only on behalf of the beneficiaries listed in RCW 4.20.020, and specifies that these damages may be recovered regardless of whether the death was caused by the injury forming the basis for the action. See RCW 4.20.046.

The special survival statute, RCW 4.20.060, provides in relevant part that “[n]o action for a personal injury to any person occasioning death shall abate . . . by reason of such death” if the decedent is survived by a statutory beneficiary (spouse, child, state registered domestic partner, dependent parent, or dependent sibling).

These survival statutes differ in several respects. The special survival statute applies only to personal injuries “occasioning death,” RCW

4.20.060, while the general survival statute applies whether or not the death was caused by the personal injury that forms the basis for the action. RCW 4.20.046.

Compensation awarded under the general survival statute, RCW 4.20.046, becomes an asset of the estate. When there are wrongful death beneficiaries, compensation for pre-death personal injuries, including medical and hospital expenses and pre-death pain, suffering, anxiety, emotional distress, humiliation, and fear are awarded to the statutory beneficiaries, in accordance with the intestate succession statute, RCW 11.04.015. See *Wilson v. Grant*, 162 Wn.App. 731, 258 P.3d 689 (2011); *Parrish v. Jones*, 44 Wn.App. 449, 722 P.2d 878 (1986).

Significance of statutory beneficiaries. For actions involving statutory beneficiaries, this pattern instruction sets out the applicable elements of damages, including both economic and noneconomic damages. By comparison, when there are no statutory beneficiaries, noneconomic damages are not available. RCW 4.20.046 (as amended in 2019, see above); RCW 4.20.060 (as amended in 2019, see above). For this reason, a separate pattern instruction has been drafted for survival actions not involving statutory beneficiaries. Compare this instruction with WPI 31.01.02 (Measure of Damages—Survival Action—No Statutory Beneficiaries).

Loss of enjoyment of life. In *Otani v. Broudy*, 151 Wn.2d 750, 760–62, 92 P.3d 192 (2004), the Supreme Court held that post-death damages for loss of enjoyment of life are not recoverable by a decedent's estate under Washington's survival statutes.

Instantaneous death. In cases involving instantaneous death, the plaintiff may not recover any damages for pain and suffering. Pain and suffering damages are available only if “measurable time” elapses between injury and death. *Chapple v. Ganger*, 851 F.Supp. 1481, 1486 (E.D.Wash. 1994) (citing *Bingaman v. Grays Harbor Comm'ty Hosp.*, 103 Wn.2d 831, 837, 699 P.2d 1230 (1985)); *Tait v. Wahl*, 97 Wn.App. 765, 770–71, 987 P.2d 127 (1999).

Avoiding double recoveries. The causes of action for wrongful death and survival may overlap in a particular case. The same recovery may be allowed under more than one statute. Care must be taken to avoid allowing a double recovery. See, e.g., *Hinzman v. Palmanteer*, 81 Wn.2d 327, 501 P.2d 1228 (1972), disapproved of on other grounds, *Wooldridge v. Woollett*, 96 Wn.2d 659, 666–67, 638 P.2d 566 (1981) (regarding duplication of damages between the general survival statute and the “child injury or death” statute); *Criscuola v. Andrews*, 82 Wn.2d 68, 69–70, 507 P.2d 149 (1973) (regarding duplication of damages between the general survival statute and the wrongful death statute).

The court in *Criscuola* stated: “The problem of prospective double compensation where actions are brought under both survival and wrongful death actions is avoided if recovery under the survival action is limited to the prospective net accumulations of the deceased.” *Criscuola*, 82 Wn.2d at 70. The WPI Committee has addressed this issue from *Criscuola* by limiting the element of lost income to net accumulations.

[Current as of April 2021.]

WPI 31.01.02

**MEASURE OF DAMAGES—SURVIVAL ACTION—NO
STATUTORY BENEFICIARIES**

It is the duty of the court to instruct you as to the measure of damages. [By instructing you on damages, the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for the plaintiff, then] you must determine the amount of money that will reasonably and fairly compensate (name of decedent)'s estate for such damages as you find were proximately caused by the negligence of the defendant.

[If you find for the plaintiff] [your verdict must include the following undisputed items:

(here insert undisputed items and amounts)

In addition] you should consider the following items:

- (1) The health care and funeral expenses that were reasonably and necessarily incurred.
- (2) The net accumulations lost to [his] [her] estate. In determining the net accumulations, you should take into account (name of decedent)'s age, health, life expectancy, occupation, and habits of industry, responsibility, and thrift. You should also take into account (name of decedent)'s earning capacity, including [his] [her] actual earnings prior to death and the earnings that reasonably would have been expected to be earned by [him] [her] in the future, including any pension benefits. Further, you should take into account the amount you find that (name of decedent) reasonably would have consumed as personal expenses and deduct this

from [his] [her] expected future earnings to determine the net accumulations.

The burden of proving damages rests upon the plaintiff. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

Your award must be based upon evidence and not upon speculation, guess, or conjecture.

NOTE ON USE

Use this instruction for survival actions (brought under RCW 4.20.046 or RCW 4.20.060) for which there are no statutory beneficiaries. For survival actions that do involve statutory beneficiaries, use WPI 31.01.01 (Measure of Damages—Survival Action—Statutory Beneficiaries) instead of this instruction.

Because this instruction is limited to cases not involving statutory beneficiaries, it will not be accompanied by a wrongful death instruction.

Use bracketed material as applicable. If some of the bracketed phrases are deleted, practitioners may need to capitalize the first word that follows the deleted phrase.

COMMENT

RCW 4.20.046 and RCW 4.20.060.

For a discussion of this instruction and its relationship with the other pattern instruction on survival action damages, see Comment to WPI 31.01.01 (Measure of Damages—Survival Action—Statutory Beneficiaries).

[Current as of April 2021.]

WPI 31.02

**MEASURE OF DAMAGES—WRONGFUL DEATH—
RCW 4.20.010—ACTION FOR BENEFIT OF SPOUSE**

(WITHDRAWN)

[Current as of April 2021.]

WPI 31.02.01

**MEASURE OF DAMAGES—WRONGFUL DEATH—
ACTION FOR BENEFIT OF SPOUSE / STATE
REGISTERED DOMESTIC PARTNER**

It is the duty of the court to instruct you as to the measure of damages on plaintiff's claim for losses suffered by (name of spouse / state registered domestic partner). [By instructing you on damages, the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for the plaintiff, then] you must determine the amount of money that will reasonably and fairly compensate (name of spouse / state registered domestic partner) for such damages as you find were proximately caused by the death of (name of decedent).

[If you find for the plaintiff] [your verdict must include the following undisputed items:

(here insert undisputed items and amounts)

In addition] you should consider the following items:

(1) Economic Damages:

- (a) [You should consider as past economic damages any benefit of value, including money, goods, and services that (name of spouse / state registered domestic partner) would have received from (name of decedent) up to the present time if (name of decedent) had lived.]

- [(b)] You should [also] consider as future economic damages what benefits of value, including money, goods, and services (name of decedent) would have contributed to (name of spouse / state registered domestic partner) in the future had (name of decedent) lived.

(2) Noneconomic Damages:

You should also consider what (name of decedent) reasonably would have been expected to contribute to (name of spouse / state registered domestic partner) in the way of [marital] [domestic partner] consortium. [“Marital consortium” means the fellowship of husband and wife and the right of one spouse to the company, cooperation, and aid of the other in the matrimonial relationship. It includes emotional support, love, affection, care, services, companionship, including sexual companionship, as well as assistance from one spouse to the other.] [“Domestic partner consortium” means the fellowship of state registered domestic partners and the right of one domestic partner to the company, cooperation, and aid of the other in the domestic partnership. It includes emotional support, love, affection, care, services, companionship, including sexual companionship, as well as assistance from one domestic partner to the other.]

In making your determinations, you should take into account (name of decedent)’s age, health, life expectancy, occupation, and habits [of industry, responsibility and thrift]. You should also take into account (name of decedent)’s earning capacity, including (name of decedent)’s actual earnings prior to death and the earnings that reasonably would have been expected to be earned by (name of decedent) in the future. In determining the amount that (name of decedent) reasonably would have been expected to contribute in the future to (name of spouse / state registered domestic partner), you should also take into account the amount you find (name of decedent) customarily contributed to (name of spouse / state registered domestic partner).

The burden of proving damages rests upon the plaintiff. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

Your award must be based upon evidence and not upon speculation, guess, or conjecture.

The law has not furnished us with any fixed standards by which to measure noneconomic damages. With reference to these matters you must be governed by your own judgment, by the evidence in the case, and by these instructions.

NOTE ON USE

Use for actions that are brought for the benefit of a surviving spouse or state registered domestic partner pursuant to RCW 4.20.010 (and RCW 4.20.020), the wrongful death statute.

Do not use this instruction for claims under RCW 4.20.046 (the general survival statute), RCW 4.20.060 (the special survival statute), or RCW 4.24.010 (the “child injury or death” statute). If elements of damage to the estate, such as funeral expenses for the decedent, are claimed by the personal representative pursuant to RCW 4.20.046 or if damages for the decedent’s pain and suffering or medical expenses are claimed by the personal representative under RCW 4.20.060, such damages should be covered separately in WPI 31.01.01 (Measure of Damages—Survival Action—Statutory Beneficiaries). For claims based on RCW 4.24.010, use WPI 31.06.01 (Measure of Damages—Wrongful Death Actions Brought by Parent for Death of Child—RCW 4.24.010).

Use bracketed material as applicable. If some of the bracketed phrases are deleted, practitioners may need to capitalize the first word that follows the deleted phrase.

See Comment for a discussion of contributory negligence.

For future damages that must be discounted to present cash value, use WPI 34.02 (Future Economic Damages—Present Cash Value).

COMMENT

RCW 4.20.010.

Beneficiaries. RCW 4.20.020 lists a surviving spouse and state registered domestic partner as beneficiaries of a wrongful death action. An unmarried person does not have a cause of action under the wrongful death statute for loss of a cohabitant’s consortium. *Roe v. Ludtke Trucking, Inc.*, 46 Wn.App. 816, 732 P.2d 1021 (1987).

It has long been established that a surviving spouse need not have been dependent upon the decedent to recover under the wrongful death statute. *Higbee v. Shorewood Osteopathic Hosp.*, 105 Wn.2d 33, 711 P.2d 306 (1985); *Clason v. Velguth*, 168 Wash. 242, 11 P.2d 249 (1932); *Jensen v. Culbert*, 134 Wash. 599, 236 P. 101 (1925). Damages in wrongful death action brought for the benefit of a surviving spouse are fixed at the decedent's death. *Stuart v. Consolidated Foods Corp.*, 6 Wn.App. 841, 496 P.2d 527 (1972). These same principles should apply in cases involving a state registered domestic partner.

Contributory negligence. RCW 4.22.020 provides in part that "in an action brought for wrongful death or loss of consortium, the contributory fault of the decedent or injured person shall be imputed to the claimant in that action." It is reversible error not to impute the contributory negligence of a decedent to the statutory beneficiaries in a wrongful death action as required by RCW 4.22.020. *Ginochio v. Hesston Corp.*, 46 Wn.App. 843, 733 P.2d 551 (1987).

[Current as of April 2021.]

WPI 31.03

**MEASURE OF DAMAGES—WRONGFUL DEATH—
RCW 4.20.010—ACTION FOR BENEFIT OF CHILD
OR DEPENDENT PARENT, BROTHER OR SISTER**

(WITHDRAWN)

[Current as of April 2021.]

WPI 31.03.01

**MEASURE OF DAMAGES—WRONGFUL DEATH—
ACTION FOR BENEFIT OF
CHILDREN/STEPCHILDREN**

It is the duty of the court to instruct you as to the measure of damages on plaintiff's claim for losses suffered by (names of children/stepchildren). [By instructing you on damages, the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for the plaintiff, then] you must determine the amount of money that will reasonably and fairly compensate (names of children/stepchildren) for such damages as you find were proximately caused by the death of (name of decedent).

[If you find for the plaintiff] [your verdict must include the following undisputed items:

(here insert undisputed items and amounts)

In addition] you should consider the following items:

(1) Economic Damages:

(a) [You should consider as past economic damages any benefit of value, including money, goods, and services that (name of children/stepchildren) would have received from (name of decedent) up to the present time if (name of decedent) had lived.]

[(b)] You should [also] consider as future economic damages what benefits of value, including money, goods, and services (name of decedent) would have contributed to (names of children/stepchildren) in the future had (name of decedent) lived.

(2) Noneconomic Damages:

You should also consider what (name of decedent) reasonably would have been expected to contribute to (names of children/stepchildren) in the way of love, care, companionship, and guidance.

In making your determinations, you should take into account (name of decedent)'s age, health, life expectancy, occupation, and habits [of industry, responsibility and thrift]. You should also take into account (name of decedent)'s earning capacity, including (name of decedent)'s actual earnings prior to death and the earnings that reasonably would have been expected to be earned by (name of decedent) in the future. In determining the amount that (name of decedent) reasonably would have been expected to contribute in the future to (names of children/stepchildren), you should take into account the amount you find (name of decedent) customarily contributed to (names of children/stepchildren).

The burden of proving damages rests upon the plaintiff. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

Your award must be based upon evidence and not upon speculation, guess, or conjecture.

The law has not furnished us with any fixed standards by which to measure noneconomic damages. With reference to these matters you must be governed by your own judgment, by the evidence in the case, and by these instructions.

NOTE ON USE

. Use for actions that are brought for the benefit of children or stepchildren pursuant to RCW 4.20.010 (and RCW 4.20.020), the wrongful death statute.

Do not use this instruction for claims under RCW 4.20.046 (the

general survival statute), RCW 4.20.060 (the special survival statute), or RCW 4.24.010 (the “child injury or death” statute). If elements of damage to the estate, such as funeral expenses for the decedent, are claimed by the personal representative pursuant to RCW 4.20.046 or if damages for the decedent’s pain and suffering or medical expenses are claimed by the personal representative under RCW 4.20.060, such damages should be covered separately in WPI 31.01.01 (Measure of Damages—Survival Action—Statutory Beneficiaries). For claims based on RCW 4.24.010, use WPI 31.06.01 (Measure of Damages—Wrongful Death Actions Brought by Parent for Death of Child—RCW 4.24.010).

Use bracketed material as applicable. If some of the bracketed phrases are deleted, practitioners may need to capitalize the first word that follows the deleted phrase.

For further discussion of contributory negligence, see the Comment to WPI 31.02.01 (Measure of Damages—Wrongful Death—Action for Benefit of Spouse/State Registered Domestic Partner).

For future damages that must be discounted to present cash value, use WPI 34.02 (Future Economic Damages—Present Cash Value).

COMMENT

See Comment to WPI 31.02.01 (Measure of Damages—Wrongful Death—Action for Benefit of Spouse/State Registered Domestic Partner).

The Washington Supreme Court created a cause of action for loss of parental consortium in *Ueland v. Reynolds Metals Co.*, 103 Wn.2d 131, 131–32, 691 P.2d 190 (1984). The court defined parental consortium as the “loss of a parent’s love, care, companionship, and guidance . . .” *Ueland*, 103 Wn.2d at 132 n.1. Subsequent cases from the Court of Appeals have involved parental consortium instructions that used slightly different terminology, but in none of these cases did the appellate court rule on the appropriate phrasing of the instruction. See *Ebsary v. Pioneer Hum. Servs.*, 59 Wn.App. 218, 224, 796 P.2d 769 (1990) (“love, affection, care, companionship, protection, guidance, and moral and intellectual training and instruction”); *Cornejo v. State*, 57 Wn.App. 314, 323, 788 P.2d 554 (1990) (“support, love, care, guidance, training, instruction and protection”).

[Current as of April 2021.]

WPI 31.03.02

**MEASURE OF DAMAGES—WRONGFUL DEATH—
ACTION FOR BENEFIT OF PARENT, BROTHER, OR
SISTER**

It is the duty of the court to instruct you as to the measure of damages on plaintiff's claim for losses suffered by (name of parent/brother/sister). [By instructing you on damages, the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for the plaintiff, then] you must determine the amount of money that will reasonably and fairly compensate (name of parent/brother/sister) for such damages as you find were proximately caused by the negligence of the defendant.

[If you find for the plaintiff] [your verdict must include the following undisputed items:

(insert undisputed items and amounts)

In addition] you should consider the following items:

1. Economic Damages:

You should consider what benefits of monetary value, including money, goods, and services the decedent would have contributed to (name of parent/brother/sister) had (name of decedent) lived.

2. Noneconomic Damages:

You should also consider what (name of decedent) reasonably would have been expected to contribute to (name of parent/brother/sister) in the way of love, care, companionship, and guidance had (name of decedent) lived.

In making your determination, you should take into account (name of decedent)'s age, health, life expectancy, occupation, and habits. You should also take into account (name of decedent)'s earning capacity, including (name of decedent)'s actual earnings prior to death and the earnings that reasonably would have been expected to be earned by (name of decedent) in the future. In determining the amount that (name of decedent) reasonably would have been expected to contribute in the future to (names of parent/brother/sister), you should also take into account the amount you find (name of decedent) customarily contributed to (name of parent/brother/sister).

The burden of proving damages rests upon the plaintiff. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

Your award must be based upon evidence and not upon speculation, guess, or conjecture.

The law has not furnished us with any fixed standards by which to measure noneconomic damages. With reference to these matters you must be governed by your own judgment, by the evidence in the case, and by these instructions.

NOTE ON USE

Use this instruction for wrongful death actions brought by "second-tier" beneficiaries, i.e., by dependent parents, brothers and sisters, under the wrongful death statute, RCW 4.20.010 (and RCW 4.20.020). For actions by "first-tier" beneficiaries under this statute, use either WPI 31.02.01 (Measure of Damages—Wrongful Death—Action for Benefit of Spouse/State Registered Domestic Partner) or WPI 31.03.01 (Measure of Damages—Wrongful Death—Action for Benefit of Children/Stepchildren).

For survival claims, use either WPI 31.01.01 (Measure of Damages—Survival Action—Statutory Beneficiaries) or WPI 31.01.02 (Measure of Damages—Survival Action—No Statutory Beneficiaries) instead of this instruction.

For claims under the "child injury or death" statute, use WPI

31.06.01 (Measure of Damages—Wrongful Death Actions Brought by Parent for Death of Child—RCW 4.24.010) instead of this instruction.

Use bracketed material as applicable. If some of the bracketed phrases are deleted, practitioners may need to capitalize the first word that follows the deleted phrase.

For further discussion of contributory negligence, see the Comment to WPI 31.02.01 (Measure of Damages—Wrongful Death—Action for Benefit of Spouse/State Registered Domestic Partner).

COMMENT

This instruction has been modified for this edition to reflect statutory changes.

Dependency no longer required. RCW 4.20.020, RCW 4.20.046, RCW 4.20.060, and RCW 4.24.010 were amended effective July 20, 2019. The amendments are remedial and retroactive and “applies to all claims that are not time-barred, as well as any claims pending in any court on July 28, 2019.” Laws 2019, Chapter 159, § 6. The amended RCW 4.20.020 maintains the prior law that parents and siblings of the decedent may potentially recover damages only if the decedent did not have a spouse, state registered domestic partner, or child at the time of death. However, under the amended RCW 4.20.020, RCW 4.20.046, and RCW 4.20.060, parents and siblings of the decedent are no longer required to demonstrate financial dependence on the decedent in order to potentially recover economic and non-economic damages. They also may recover if they do not reside in the United States.

It is no longer required that dependency be established for “second-tier” beneficiaries (parents, brothers or sisters) in order to pursue claims under RCW 4.20.010–.060. Under RCW 4.20.010 et seq., parents, brothers, or sisters may only pursue wrongful death claims if the decedent was not survived by a spouse, state registered domestic partner, or children.

Election of remedies for parents. If the parents meet the statutory criteria, they have an election of remedies and may sue under either the wrongful death statute (RCW 4.20.010) or the “child injury or death” statute (RCW 4.24.010). *Machek v. City of Seattle*, 118 Wash. 42, 45, 48, 203 P. 25 (1921); *Cavazos v. Franklin*, 73 Wn.App. 116, 121, 867 P.2d 674 (1994); *Masunaga v. Gapasin*, 57 Wn.App. 624, 627–28, 790 P.2d 171 (1990). The damage elements are different under each statute.

Siblings. Non-dependent siblings of a decedent do not have a cause

of action for loss of consortium if the decedent is survived by a spouse, registered domestic partner, or child under RCW 4.20.010 and RCW 4.20.020.

For a discussion of other issues relating to the wrongful death statute, RCW 4.20.010, see the Comment to WPI 31.02.01 (Measure of Damages—Wrongful Death—Action for Benefit of Spouse/State Registered Domestic Partner). For a discussion of other issues relating to the “child injury or death” statute, RCW 4.24.010; see the Comment to WPI 31.06.01 (Measure of Damages—Wrongful Death Actions Brought by Parent for Death of Child—RCW 4.24.010).

[Current as of April 2021.]

WPI 31.05

**ACTION FOR WRONGFUL DEATH BY PERSONAL
REPRESENTATIVE**

(WITHDRAWN)

[Current as of April 2021.]

WPI 31.06

**MEASURE OF DAMAGES—WRONGFUL DEATH OF
CHILD BROUGHT BY PARENT—RCW 4.20.010**

(WITHDRAWN)

[Current as of April 2021.]

WPI 31.06.01

**MEASURE OF DAMAGES—WRONGFUL DEATH
ACTIONS BROUGHT BY PARENT FOR DEATH OF
CHILD—RCW 4.24.010**

It is the duty of the court to instruct you as to the measure of damages [on plaintiffs' claim for personal losses suffered by (names of parents)]. [By instructing you on damages, the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for the plaintiffs, then] you must determine the amount of money that will reasonably and fairly compensate (names of parents) for such damages as you find were proximately caused by the negligence of the defendant.

[If you find for the plaintiffs] [your verdict must include the following undisputed items:

(insert undisputed items and amounts)

In addition] you should consider the following items:

1. Economic Damages

[(a)] [The reasonable value of necessary medical care, treatment, and services received by (name of child).]

[(b)] [The reasonable value of (name of child)'s funeral and burial expenses.]

[(c)] [The economic value of services and support (name of child) reasonably would have been expected to contribute to (name of parents) from the date of (name of child)'s injury [until [he] [she] would have attained the age of majority], less the cost to (name of parents) of (name of

child)'s support and maintenance [during that interval].]

2. Noneconomic Damages

[(a)] [The loss of love and the destruction of the parent-child relationship and the suffering of (name of parents) as a result of (name of child)'s death.]

[(b)] [The loss of companionship, including mutual society and protection, of (name of child) to (name of parents).]

In making your determinations, you should take into account (name of child)'s age, health, life expectancy, character, and habits, as well as any other relevant factors.

The burden of proving damages rests upon the plaintiff. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

Your award must be based upon evidence and not upon speculation, guess, or conjecture.

The law has not furnished us with any fixed standards by which to measure noneconomic damages. With reference to these matters you must be governed by your own judgment, by the evidence in the case, and by these instructions.

NOTE ON USE

Use for wrongful death actions filed by a parent under RCW 4.24.010 (the child injury or death statute). Do not use this instruction if the parents have elected to sue under the wrongful death statute, RCW 4.20.010.

Do not use this instruction for claims under RCW 4.20.046 (the general survival statute) or RCW 4.20.060 (the special survival statute). If elements of damage to the estate of the child are claimed by the

personal representative pursuant to either of those statutes, use WPI 31.01.01 (Measure of Damages—Survival Action—Statutory Beneficiaries) or WPI 31.01.02 (Measure of Damages—Survival Action—No Statutory Beneficiaries), as appropriate.

Use bracketed material as applicable. If some of the bracketed phrases are deleted, practitioners may need to capitalize the first word that follows the deleted phrase.

See Comment for further discussion of contributory negligence of children.

COMMENT

This instruction has been modified for this edition. RCW 4.24.010 was amended effective July 28, 2019, to allow claims by parents for the death or injury of an adult child who is not survived by a spouse, state registered domestic partner, or children of his or her own, so long as the parent, parents, or legal guardian have had significant involvement in the life of the deceased adult child. “Significant involvement” is defined at RCW 4.24.010(1). The amendment is remedial and retroactive and “applies to all claims that are not time-barred, as well as any claims pending in any court on July 28, 2019.” Laws 2019, Chapter 159, § 6. The amendment does not affect the prior requirement that the parents or legal guardians of a deceased minor child demonstrate that he or she regularly contributed to the support of the minor child. RCW 4.24.010 (1).

There are several somewhat related statutes. The potentially recoverable noneconomic damages differ depending upon whether the claims for damages arising out of the death of a child are pursued under the wrongful death statute, RCW 4.20.010, or the child injury or death statute, RCW 4.24.010. For instance, the recovery of the parents’ personal grief, mental anguish, and suffering as a result of the child’s death is not recoverable under RCW 4.20.010 et seq.

For a general discussion, see DeWolf & Allen, 16 Washington Practice, Tort Law and Practice §§ 7:2, 7:4 (5th ed.).

Background. A claim by the personal representative for loss to the estate under RCW 4.20.046 (the general survival statute), or, in cases involving the death of a child upon whom the parents were dependent for support, under RCW 4.20.060 (the special survival statute), is often joined in the same action with the direct claim of a parent for wrongful death under RCW 4.24.010 (the child injury or death statute). This instruction covers only those damages recoverable for the parents’ direct

action under RCW 4.24.010. A separate instruction is needed for claims for damages to the child's estate brought by the personal representative under one of the survival statutes.

Election of remedies. If the parents meet the statutory criteria, they have an election of remedies and may sue under either the wrongful death statute (RCW 4.20.010) or the parental claim for death of a child statute (RCW 4.24.010). *Machek v. City of Seattle*, 118 Wash. 42, 45, 48, 203 P. 25 (1921); *Cavazos v. Franklin*, 73 Wn.App. 116, 121, 867 P.2d 674 (1994); *Masunaga v. Gapasin*, 57 Wn.App. 624, 627–28, 790 P.2d 171 (1990). In addition to either of these remedies, the personal representative can maintain an entirely independent survival action. *Cavazos*, 73 Wn.App. at 121.

Elements of damages. The court in *Hinzman v. Palmanteer*, 81 Wn.2d 327, 329, 331–32, 501 P.2d 1228 (1972), held that the statutory terms “loss of love and injury to or destruction of the parent-child relationship” were intended by the Legislature to add “parental grief, mental anguish and suffering” as elements of damages under RCW 4.24.010. The *Hinzman* court also held that those elements of damages were in addition to “loss of companionship,” which existing case law defined to be “the value of mutual society and protection.” *Hinzman*, 81 Wn.2d at 329, 331–32 (quoting *Clark v. Icicle Irr. Dist.*, 72 Wn.2d 201, 432 P.2d 541 (1967)). The court in *Hinzman* also held that it was not error to instruct on damages in the words of the statute.

Death of a minor child. Damages under RCW 4.24.010 for loss of companionship or for injury to or destruction of the parent-child relationship are not limited to the period of the decedent's minority. *Balmer v. Dilley*, 81 Wn.2d 367, 371–72, 502 P.2d 456 (1972). In a case involving the death of a minor child, as opposed to the death of a child upon whom the parents are dependent for support, the measure of economic damages under RCW 4.24.010 for loss of services and support has been limited to the period of the decedent's minority. See *Skeels v. Davidson*, 18 Wn.2d 358, 139 P.2d 301 (1943); *Mieske v. Pub. Util. Dist. No. 1 of Cowlitz Cnty.*, 42 Wn.2d 871, 259 P.2d 647 (1953); *Lockhart v. Besel*, 71 Wn.2d 112, 426 P.2d 605 (1967) (overruling *Skeels* in part) (holding that the measure of damages under RCW 4.24.010 should be extended to include the loss of companionship of a minor child during the minority).

Death of an adult child. Pursuant to the amendment of RCW 4.24.010, effective July 28, 2019, a parent or legal guardian who has had significant involvement in the life of an adult child may elect to pursue damages under this statute only if the child has no spouse, state registered domestic partner, or children.

Contributory negligence. RCW 4.22.020 provides in part that,

“in an action brought for wrongful death or loss of consortium, the contributory fault of the decedent or injured person shall be imputed to the claimant in that action.” Traditionally, children under age six have not been held contributorily negligent. *Price v. Kitsap Transit*, 125 Wn.2d 456, 461–62, 886 P.2d 556 (1994); *Bauman v. Crawford*, 104 Wn.2d 241, 704 P.2d 1181 (1985). For a related discussion, see the Comment to WPI 11.03 (Child under Six Years of Age Incapable of Contributory Negligence).

[Current as of September 2021.]

WPI 31.07

**WRONGFUL DEATH AND SURVIVAL ACTIONS—NO
CONTRIBUTORY NEGLIGENCE—SPECIAL
VERDICT FORM**

**IN THE SUPERIOR COURT OF THE STATE OF WASHING-
TON FOR _____ COUNTY**

_____,
as Personal
Representative
of the Estate of

_____,
Plaintiff,

vs.

_____,
Defendant.

NO. _____

**SPECIAL
VERDICT
FORM**

**We, the jury, answer the following questions submit-
ted by the court:**

QUESTION 1: Was (name of defendant) **negligent?**

ANSWER: _____ (Write "yes" or "no")

(INSTRUCTION: If you answered "no" to Question 1, do not answer any further questions; sign this verdict. If you answered "yes" to Question 1, answer Question 2.)

QUESTION 2: Was (name of defendant)'s negligence a proximate cause of the death of (name of decedent)?

ANSWER: _____ (Write "yes" or "no")

(INSTRUCTION: If you answered "no" to Question 2, do

not answer any further questions; sign this verdict. If you answered “yes” to Question 2, answer Question 3.)

QUESTION 3: What do you find to be the amount of damages for each of the following:

A. Personal Damages of (name of decedent): \$ _____

B. Damages of the Beneficiaries:

For (name of first beneficiary): \$ _____

For (name of second beneficiary): \$ _____

For (name of third beneficiary): \$ _____

(INSTRUCTION: Sign this verdict and notify the bailiff.)

Dated this _____ day of _____, 20____.

Presiding Juror

NOTE ON USE

This special verdict form is for use in wrongful death and survival actions that do not involve contributory negligence. For those wrongful death and survival actions that do involve contributory negligence, use WPI 31.07.01 (Wrongful Death and Survival Actions—Contributory Negligence—Special Verdict Form) instead of this special verdict form.

This special verdict form will need to be modified for cases involving multiple defendants or “empty chairs.” For assistance in this regard, see WPI 45.24 (Special Verdict Form—Personal Injury/Wrongful Death—Multiple Defendants—No Contributory Negligence—No “Empty Chairs”) or WPI 45.25 (Special Verdict Form—Personal Injury/Wrongful Death—Multiple Defendants—No Contributory Negligence—“Empty Chairs”).

For a personal injury case involving married co-plaintiffs, the verdict form and damage instruction should take into account the community property issues discussed in *Brown v. Brown*, 100 Wn.2d 729, 675 P.2d 1207 (1984). See the Comment to WPI 30.01.01 (Measure of Economic and Noneconomic Damages—Personal Injury—No Contributory Negligence).

Use WPI 1.11 (Concluding Instruction—For Special Verdict Form) with this verdict form.

COMMENT

For a discussion of the issues involved in drafting special verdict forms, see WPI Chapter 45 (Forms of Verdicts).

[Current as of October 2021.]

WPI 31.07.01

WRONGFUL DEATH AND SURVIVAL ACTIONS—
CONTRIBUTORY NEGLIGENCE—SPECIAL
VERDICT FORM

IN THE SUPERIOR COURT OF THE STATE OF WASHING-
TON FOR _____ COUNTY

_____, as Personal Representative of the Estate of _____ Plaintiff, vs. _____, Defendant.	} NO. _____ SPECIAL VERDICT FORM
---	---

We, the jury, answer the following questions submit-
ted by the court:

QUESTION 1: Was (name of defendant) negligent?

ANSWER: _____ (Write “yes” or “no”)

(INSTRUCTION: If you answered “no” to Question 1, do not answer any further questions; sign this verdict. If you answered “yes” to Question 1, answer Question 2.)

QUESTION 2: Was (name of defendant)’s negligence a proximate cause of the death of (name of decedent)?

ANSWER: _____ (Write “yes” or “no”)

(INSTRUCTION: If you answered “no” to Question 2, do

not answer any further questions; sign this verdict. If you answered "yes" to Question 2, answer Question 3.)

QUESTION 3: What do you find to be the amount of damages for each of the following:

A. Personal Damages of (name of decedent): \$ _____

B. Damages of the Beneficiaries:

For (name of first beneficiary): \$ _____

For (name of second beneficiary): \$ _____

For (name of third beneficiary): \$ _____

(INSTRUCTION: Answer Question 4.)

QUESTION 4: Was (name of decedent) **also negligent?**

ANSWER: _____ (Write "yes" or "no")

(INSTRUCTION: If you answered "no" to Question 4, do not answer any further questions; sign this verdict. If you answered "yes" to Question 4, answer Question 5.)

QUESTION 5: Was (name of decedent)'s negligence a proximate cause of [his] [her] death?

ANSWER: _____ (Write "yes" or "no")

(INSTRUCTION: If you answered "no" to Question 5, do not answer any further questions; sign this verdict. If you answered "yes" to Question 5, answer Question 6.)

QUESTION 6: Assume that 100% represents the total combined negligence that proximately caused (name of decedent)'s [injury] [damage]. What percent of this 100% is attributable to (name of decedent)'s negligence and what percentage of this 100% is attributable to (name of defendant)'s negligence? Your total must equal 100%.

ANSWER:	<u>Percentage</u>
To <u>(name of decedent):</u>	%
To <u>(name of defendant):</u>	%
TOTAL:	100%

(INSTRUCTION: Sign this verdict and notify the bailiff.)

Dated this _____ day of _____, 20__.

Presiding Juror

NOTE ON USE

This special verdict form is for use in wrongful death and survival actions involving contributory negligence. For those wrongful death and survival actions that do not involve contributory negligence, use WPI 31.07 (Wrongful Death and Survival Actions—No Contributory Negligence—Special Verdict Form) instead of this special verdict form.

This special verdict form will need to be modified for cases involving multiple defendants or “empty chairs.” For assistance in this regard, see WPI 45.26 (Special Verdict Form—Personal Injury/Wrongful Death—Multiple Defendants—Contributory Negligence—No “Empty Chairs”) or WPI 45.27 (Special Verdict Form—Personal Injury/Wrongful Death—Multiple Defendants—Contributory Negligence—“Empty Chairs”).

This special verdict form will also need to be modified for cases involving issues of a beneficiary’s contributory negligence.

For a personal injury case involving married co-plaintiffs, the verdict form and damage instruction should take into account the community property issues discussed in *Brown v. Brown*, 100 Wn.2d 729, 675 P.2d 1207 (1984). See the Comment to WPI 30.01.01 (Measure of Economic and Noneconomic Damages—Personal Injury—No Contributory Negligence).

Use WPI 1.11 (Concluding Instruction—For Special Verdict Form), WPI 21.03 (Burden of Proof on the Issues—Contributory Negligence—No Counterclaim), and WPI 11.01 (Contributory Negligence—Definition) with this verdict form.

COMMENT

For a discussion of the issues involved in drafting special verdict forms, see WPI Chapter 45 (Forms of Verdicts).

[Current as of October 2021.]

CHAPTER 32

DAMAGES—INJURY TO SPOUSE, DOMESTIC PARTNER, PARENT, OR CHILD

- WPI 32.01 Measure of Damages—Injury to Spouse
- WPI 32.02 Measure of Damages—Medical Expense—Past and
 Future
- WPI 32.04 Measure of Damages—Loss of Consortium—Spouse/
 State Registered Domestic Partner
- WPI 32.05 Measure of Damages—Loss of Consortium—Parent
- WPI 32.06 Measure of Damages—Injury to Child—Action Brought
 by Parent (RCW 4.24.010)
- WPI 32.06.01 Measure of Damages—Injury to Child—Action Brought
 by Parent or Legal Guardian (RCW 4.24.010)

WPI 32.01

MEASURE OF DAMAGES—INJURY TO SPOUSE

(WITHDRAWN)

[Current as of April 2021.]

WPI 32.02

**MEASURE OF DAMAGES—MEDICAL EXPENSE—
PAST AND FUTURE**

(WITHDRAWN)

[Current as of April 2021.]

WPI 32.04

**MEASURE OF DAMAGES—LOSS OF
CONSORTIUM—SPOUSE/STATE REGISTERED
DOMESTIC PARTNER**

Loss [to the plaintiff husband] [to the plaintiff wife] [to the plaintiff state registered domestic partner] of the consortium of [his] [her] [wife] [husband] [state registered domestic partner].

The term “consortium” means the fellowship of [spouses] [husband and wife] [state registered domestic partners] and the right of [one spouse] [one domestic partner] to the company, cooperation, and aid of the other in the [matrimonial] [domestic partnership] relationship. It includes emotional support, love, affection, care, services, companionship, including sexual companionship, as well as assistance from [one spouse] [one domestic partner] to the other.

NOTE ON USE

For actions in which loss of spousal or state registered domestic partner consortium is claimed in an injury case, this phrase is to be inserted in the noneconomic damages section of the damage instruction (WPI 30.01.01, WPI 30.02.01, or WPI 30.03.01) when the evidence justifies its use.

In an action involving the death of a spouse or state registered domestic partner, use WPI 31.02.01 (Measure of Damages—Wrongful Death—RCW 4.20.010—Action for Benefit of Spouse/State Registered Domestic Partner).

Use bracketed material as applicable.

COMMENT

In 2019, the Legislature substantially amended statutes applicable to wrongful death actions. RCW 4.20.010, which previously allowed statutory beneficiaries such as spouses to assert an action simply for “damages,” was amended to provide an action “for the economic and noneconomic damages sustained by the beneficiaries listed in RCW

4.20.020 . . . in such amounts as determined by a trier of fact to be just under all the circumstances of the case.” Laws of 2019, Chapter 59, § 1. The amendments retroactively apply to “all claims that are not time barred, as well as any claims pending in any court on the effective date of this section.” Laws of 2019, Chapter 59, § 6.

Loss of consortium by domestic partners. The Legislature amended the statute on wrongful death actions, RCW 4.20.020, to specify that consortium may be recovered in such cases by state registered domestic partners. See Laws of 2007, Chapter 156, § 29. For injury actions, however, there is no corresponding statute addressing loss of consortium, so the Legislature has not expressly addressed this issue. The WPI Committee believes that the Legislature’s enactment for wrongful death cases would be implied for the personal injury actions, which are governed by the common law. See generally DeWolf & Allen, 16 Washington Practice, Tort Law and Practice § 6.33 (5th ed.). Additionally, the 2009 Legislature passed a bill stating its intent that state registered domestic partners are to be treated the same as spouses, including by extending to domestic partners the common law rights that apply to spouses. See Laws of 2009, Chapter 521, § 1. For these reasons, domestic partners were added to the pattern instruction above as part of the WPI Committee’s 2009 revisions.

Loss of consortium by spouse. Loss of consortium is a proper element of damage in an action involving injury to a spouse. *Lundgren v. Whitney’s, Inc.*, 94 Wn.2d 91, 96, 614 P.2d 1272 (1980).

Loss of consortium generally. Loss of consortium is the separate claim of the “deprived” spouse suffering the loss and any recovery received is that spouse’s property. See *Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 776, 733 P.2d 530 (1987). See the Comment to WPI 30.01 (Measure of Damages—Personal and Property—No Contributory Negligence) for a discussion relating to the listing of such claims separately in the verdict form. Because loss of consortium is the separate claim of the deprived spouse, the “impaired” spouse, who suffered the primary injury, need not be joined as a party. See *Reichelt*, 107 Wn.2d at 776 (citing *Lund v. Caple*, 100 Wn.2d 739, 743–44, 675 P.2d 226 (1984)) (holding that a claim for loss of consortium does not necessarily accrue when the impaired spouse’s claim accrues).

Nevertheless, a loss of consortium action by the deprived spouse will not be recognized if an action for the underlying injury to the impaired spouse cannot be brought or is prohibited or abolished. See *Provost v. Puget Sound Power & Light Co.*, 103 Wn.2d 750, 755–56, 696 P.2d 1238 (1985) (worker’s compensation was the exclusive remedy for an injured employee and barred an action for loss of consortium by his

spouse against his employer); *Lund*, 100 Wn.2d 739 (the prohibition on actions for alienation of affections extends to actions for alleged sexual misconduct in which the only damages sought are for loss of consortium); *Lien v. Barnett*, 58 Wn.App. 680, 685, 794 P.2d 865 (1990) (dismissing the action and holding that “Lien’s lawsuit, as that in *Lund*, is in essence a substitution for an abolished alienation of affections action that as a matter of public policy is barred”); *Conradt v. Four Star Promotions, Inc.*, 45 Wn.App. 847, 853, 728 P.2d 617 (1986) (wife was prevented from maintaining an action for loss of consortium resulting from injuries sustained by husband in a demolition race because prior to the race the husband had signed a release form).

Contributory fault. RCW 4.22.020 provides in part that “in an action brought for wrongful death or loss of consortium, the contributory fault of the decedent or injured person shall be imputed to the claimant in that action.” The statute as amended in 1987 overrules *Christie v. Maxwell*, 40 Wn.App. 40, 42, 696 P.2d 1256 (1985), which had held that under RCW 4.22.020, as it was then written, the contributory fault of the impaired spouse could not be imputed to the deprived spouse in an action for loss of consortium.

[Current as of April 2021.]

WPI 32.05

**MEASURE OF DAMAGES—LOSS OF
CONSORTIUM—PARENT**

**Loss to (child's name) of the love, care, companionship,
and guidance of (parent's name).**

NOTE ON USE

For actions in which loss of parental consortium is claimed in an injury case, this phrase is to be inserted in the noneconomic damages section of the damage instruction (WPI 30.01.01, WPI 30.02.01, or WPI 30.03.01) when the evidence justifies its use.

In an action involving the death of a parent, use WPI 31.03.01 (Measure of Damages—Wrongful Death—Action for Benefit of Children/Stepchildren).

COMMENT

In 2019, the Legislature substantially amended statutes applicable to wrongful death actions. RCW 4.20.010, which previously allowed statutory beneficiaries such as spouses to assert an action simply for “damages,” was amended to provide an action “for the economic and noneconomic damages sustained by the beneficiaries listed in RCW 4.20.020 . . . in such amounts as determined by a trier of fact to be just under all the circumstances of the case.” Laws of 2019, Chapter 59, § 1. The amendments retroactively apply to “all claims that are not time barred, as well as any claims pending in any court on the effective date of this section.” Laws of 2019, Chapter 59, § 6.

A child has an independent cause of action for loss of love, care, companionship, and guidance of a parent tortiously injured by a third party. But the child’s claim for loss of parental consortium must be joined with the injured parent’s claim unless it is shown why joinder with the parent’s underlying claim is not feasible. Moreover, the jury should be instructed that the child’s damages should be considered separately from those of the injured parent. *Ueland v. Reynolds Metals Co.*, 103 Wn.2d 131, 139, 691 P.2d 190 (1984). For additional discussion of the definition of parental consortium, see WPI 31.03.01 (Measure of Damages—Wrongful Death—Action for Benefit of Children/Stepchildren).

For further discussion relating to actions for loss of consortium see

the Comment to WPI 32.04 (Measure of Damages—Loss of Consortium—Spouse/State Registered Domestic Partner).

[Current as of April 2021.]

WPI 32.06

**MEASURE OF DAMAGES—INJURY TO CHILD—
ACTION BROUGHT BY PARENT (RCW 4.24.010)**

(WITHDRAWN)

COMMENT

This instruction, which applied solely to particular actions filed before August 1, 1986, has been withdrawn.

[Current as of April 2021.]

WPI 32.06.01

**MEASURE OF DAMAGES—INJURY TO CHILD—
ACTION BROUGHT BY PARENT OR LEGAL
GUARDIAN (RCW 4.24.010)**

It is the duty of the court to instruct you as to the measure of damages. [By instructing you on damages, the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for the plaintiff [parent] [legal guardian], then] you must determine the amount of money that will reasonably and fairly compensate the plaintiff for such damages to plaintiff that you find were proximately caused by the injury to the child.

[If you find for the plaintiff] [your verdict must include the following undisputed items:

[insert undisputed items and amounts]

In addition,] you should consider the following items:

1. Economic Damages

[(a)] [The reasonable value of necessary medical care, treatment, and services received by (name of child).]

[(b)] [The economic value of services and support (name of child) reasonably would have been expected to contribute to (name of parents or legal guardians) from the date of (name of child)'s injury [until [he] [she] would have attained the age of majority], less the cost to (name of parents or legal guardians) of (name of child)'s support and maintenance [during that interval].]

[(c)] [What support the child reasonably would

have been expected to contribute to the plaintiff up to the present time if the child had not been injured.]

2. Noneconomic Damages

[(a)] [The loss of love and injury to or the destruction of the parent-child relationship between (name of child) and (name of parents or legal guardians), including the grief, mental anguish, and suffering of (name of parents or legal guardians) as a result of (name of child)'s injury.]

[(b)] [The loss of emotional support of (name of child) to (name of parents or legal guardians).]

[(c)] [The loss of companionship, including mutual society and protection, of (name of child) to (name of parents or legal guardians).]

In making your determination, you should take into account (name of child)'s age, health, life expectancy, character, and habits, as well as all other relevant factors.

The burden of proving damages rests upon the plaintiff. It is for you to determine, based upon the evidence, whether any damages have been proved by a preponderance of the evidence.

Your award must be based upon evidence and not upon speculation, guess, or conjecture.

The law has not furnished us with any fixed standards by which to measure noneconomic damages. With reference to these matters you must be governed by your own judgment, by the evidence in the case, and by these instructions.

NOTE ON USE

Use for actions filed by a parent or legal guardian under RCW 4.24.010 for injury to a minor child in whose life the parent or legal guardian has had a “significant involvement.”

Use bracketed material as applicable. In selecting the bracketed phrases relating to loss of services or loss of support, care must be taken to avoid duplication and overlapping of damage elements. Either loss of services or loss of support, or both, may apply in a particular case. In a directed verdict or admitted liability case, delete the first two sets of bracketed material and capitalize the first words that follow the deleted material.

A claim by a guardian ad litem may be joined in the same action with this direct claim by the parent under RCW 4.24.010. In that event, the bracketed phrase relating to the present cash value of future earnings may be used. The child is the proper beneficiary of a claim such as loss of future earnings. Therefore, it may be necessary to cover that damage claim in a separate instruction because it is not directly recoverable by a parent plaintiff. If the parent is, in fact, the guardian ad litem, it may be practical to include that bracketed phrase in this instruction. Care must be taken to avoid duplication of damage elements.

COMMENT

This instruction has been revised for this edition to reflect these significant amendments to the statute.

In 2019, the Legislature substantially amended statutes applicable to actions involving the injury or death of a child. RCW 4.24.010, which previously provided a cause of action to a “mother or father, or both,” was amended to provide an action to a “parent or legal guardian.” Laws of 2019, Chapter 59, § 5.

The statute, which previously provided a cause of action for injury or death to a child on whom a parent was “dependent on support,” also was amended to strike the economic dependency requirement and replace it with a requirement that the parent had “significant involvement in the life of an adult child.” Laws of 2019, Chapter 59, § 5. The amendments define “significant involvement” as “demonstrated support of an emotional, psychological, or financial nature within the parent-child relationship, at or reasonably near the time of death, or at or reasonably near the time of the incident causing death, including either giving or receiving emotional, psychological, or financial support to or from the child.” Laws of 2019, Chapter 59, § 5.

The statute, which previously did not delineate recoverable damages, was amended to expressly provide: “In addition to recovering damages for the child’s health care expenses, loss of the child’s services, loss of the child’s financial support, and other economic losses, damages may be also recovered under this section for the loss of love and companionship of the child, loss of the child’s emotional support, and for injury to or destruction of the parent-child relationship, in such amounts as determined by a trier of fact to be just under all the circumstances of the case.” Laws of 2019, Chapter 59, § 5.

The amendments retroactively apply to “all claims that are not time barred, as well as any claims pending in any court on the effective date of this section.” Laws of 2019, Chapter 59, § 6.

Elements of economic and noneconomic damages are further delineated in RCW 4.56.250(1).

In *Hinzman v. Palmanteer*, 81 Wn.2d 327, 329, 501 P.2d 1228 (1972), disapproved of on other grounds, *Wooldridge v. Woollett*, 96 Wn.2d 659, 638 P.2d 566 (1981), the court held that “loss of love and companionship” and “destruction of the parent-child relationship” are separate and distinct items under RCW 4.24.010 and that damages may be allowed for each. That case also holds that it is not error to instruct in the words of RCW 4.24.010. *Hinzman*, 81 Wn.2d at 329.

In *Wilson v. Lund*, 80 Wn.2d 91, 105, 491 P.2d 1287 (1971), an action for the death of a child brought pursuant to RCW 4.24.010, the trial court instructed that the jury was not to consider parental grief, mental anguish, or suffering (see the concurring opinion of Justice Wright). The Washington Supreme Court reversed, construing the language “loss of love . . . and . . . injury to or destruction of the parent-child relationship” as providing recovery for parental grief, mental anguish, and suffering in cases involving the wrongful death of or injury to a child under RCW 4.24.010. *Wilson*, 80 Wn.2d at 105–06.

In *Burt v. Ross*, 43 Wn.App. 129, 131–32, 715 P.2d 538 (1986), the court held that a 20-year old is not a minor for purposes of RCW 4.24.010. Damages for loss of companionship or for injury to or destruction of the parent-child relationship are not limited to the period of the child’s minority. *Balmer v. Dilley*, 81 Wn.2d 367, 371–72, 502 P.2d 456 (1972).

A parent cannot recover under RCW 4.24.010 for loss of an injured minor’s services without proof that some services would have been performed. *Lofgren v. W. Wash. Corp. of Seventh Day Adventists*, 65 Wn.2d 144, 396 P.2d 139 (1964); see also *Clark v. Icicle Irrigation Dist.*, 72 Wn.2d 201, 208–10, 432 P.2d 541 (1967) (there must be substantial evidence to support recovery for loss of services of a child).

RCW 4.22.020 provides in part that “[i]n an action brought for wrongful death or loss of consortium, the contributory fault of the decedent or injured person shall be imputed to the claimant in that action.” Traditionally, children under six have not been held contributorily negligent. *Price v. Kitsap Transit*, 125 Wn.2d 456, 461, 886 P.2d 556 (1994); *Bauman v. Crawford*, 104 Wn.2d 241, 244, 704 P.2d 1181 (1985). The statute does not state whether the fault of a child under six can be imputed to the child’s parents in an action brought pursuant to RCW 4.24.010. For a related discussion, see the Comment to WPI 11.03 (Child Under Six Years of Age Incapable of Contributory Negligence).

A cause of action for alienation of a child’s affection has been approved by the Court of Appeals. See *Waller v. State*, 64 Wn.App. 318, 338–39, 824 P.2d 1225 (1992); *Strode v. Gleason*, 9 Wn.App. 13, 510 P.2d 250, 60 A.L.R.3d 924 (1973). But see *Babcock v. State*, 112 Wn.2d 83, 107–08, 768 P.2d 481 (1989), on reconsideration affirmed in part, reversed in part, 116 Wn.2d 596, 809 P.2d 143 (1991) (stopping short of recognizing this cause of action, holding instead that even if the cause of action exists, the plaintiff had not proved the necessary elements from *Strode*). The relationship between the cause of action for alienation of a child’s affection and the provision of RCW 4.24.010 that allows a parent to recover damages for injury to or destruction of the parent-child relationship is not clear. The WPI Committee could locate no cases addressing this issue.

See WPI 31.00 (Introduction) and the Comment to WPI 30.01.01 (Measure of Economic and Noneconomic Damages—Personal Injury—No Contributory Negligence).

See the Comment to WPI 31.02.01 (Measure of Damages—Wrongful Death—Action for Benefit of Spouse/State Registered Domestic Partner).

[Current as of April 2021.]

CHAPTER 33

DAMAGES—MITIGATION—AVOIDABLE CONSEQUENCES

- WPI 33.01 Avoidable Consequences—Personal Injury Generally
WPI 33.02 Avoidable Consequences—Failure to Secure Treatment
WPI 33.03 Avoidable Consequences—Property or Business

WPI 33.01

AVOIDABLE CONSEQUENCES—PERSONAL INJURY GENERALLY

A person who is liable for an injury to another is not liable for any damages arising after the original [injury] [event] that are proximately caused by failure of the injured person to exercise ordinary care to avoid or minimize such new or increased damage.

(Insert name of applicable party) has the burden to prove (insert name of other party)'s failure to exercise ordinary care and the amount of damages, if any, that would have been minimized or avoided.

NOTE ON USE

Use this instruction only if (1) there is evidence creating an issue of fact as to the injured person's failure to exercise ordinary care in minimizing or avoiding damages, and (2) the evidence permits a segregation of the damages resulting from that failure to exercise ordinary care.

Use bracketed material as applicable. Specific applications of this general instruction are found at WPI 33.02 (Avoidable Consequences—Failure to Secure Treatment) and WPI 33.03 (Avoidable Consequences—Property or Business).

COMMENT

RCW 4.22.005 and RCW 4.22.015.

RCW 4.22.005 provides that contributory fault proportionately diminishes the amount of a claimant's recovery. RCW 4.22.015 defines "fault" as including "unreasonable failure to avoid an injury or to mitigate damages."

The duty to mitigate damages applies to a claim for lost earnings. *Kubista v. Romaine*, 87 Wn.2d 62, 68-69, 549 P.2d 491 (1976); *Ward v. Painters' Local Union No. 300*, 45 Wn.2d 533, 542, 276 P.2d 576 (1954).

One injured by the tort of another is not entitled to recover damages for any harm that the injured person could have avoided by use of reasonable effort or expenditure after the commission of the tort. Restatement (Second) of Torts § 918(1) (1979). However, a plaintiff's duty to mitigate damages has some limitation. A defendant who intends a particular harmful result or who is aware of the result and is recklessly indifferent to its happening, is required to pay damages for it, unless the injured person, realizing the danger, intentionally fails to act in the protection of his or her own interests or is heedlessly indifferent to them. Restatement (Second) of Torts § 918(2) (1979); see also *Cobb v. Snohomish Cnty.*, 86 Wn.App. 223, 232, 935 P.2d 1384 (1997).

This pattern instruction has always been framed in terms of a prohibition against recovering damages for reasonably avoidable consequences, with the exceptions noted in the preceding paragraph. This formulation differs slightly from the language of the 1986 Tort Reform Act, which can be interpreted as meaning that a plaintiff's failure to mitigate damages is merely one factor to be balanced in the weighing of fault rather than a prohibition against recovery. See RCW 4.22.005; RCW 4.22.015. The WPI Committee has retained the common law formulation because the case law appears to follow this approach. See *Cobb*, 86 Wn.App. at 231. ("The doctrine of avoidable consequences, also known as mitigation of damages, prevents recovery for damages the injured party could have avoided through reasonable efforts."); *Cox v. Keg Rests. U.S., Inc.*, 86 Wn.App. 239, 244, 935 P.2d 1377 (1997) ("An injured party generally may not recover damages proximately caused by that person's unreasonable failure to mitigate.").

The party asserting the claim of an unreasonable failure to mitigate damages bears the burden of proof. *Kubista*, 87 Wn.2d at 67 n.1; *Cox*, 86 Wn.App. at 244.

In *Sutton v. Shufelberger*, 31 Wn.App. 579, 582, 643 P.2d 920 (1982), the court approved the former version of WPI 33.01.

In *Helmbreck v. McPhee*, 15 Wn.App.2d 41, 476 P.3d 589 (2020), the court affirmed the trial court's giving of WPI 33.01, concluding there

was substantial evidence that the plaintiff's actions after the car accident at issue aggravated his back injury.

For additional discussion, see the Comments accompanying WPI 33.02 (Avoidable Consequences—Failure to Secure Treatment) and WPI 33.03 (Avoidable Consequences—Property or Business).

[Current as of April 2021.]

WPI 33.02

**AVOIDABLE CONSEQUENCES—FAILURE TO
SECURE TREATMENT**

A person who is liable for an injury to another is not liable for any damages arising after the original [injury] [event] that are proximately caused by failure of the injured person to exercise ordinary care to avoid or minimize such new or increased damages.

In determining whether, in the exercise of ordinary care, a person should have secured or submitted to medical treatment, as contended by (insert name of applicable party), you may consider [the nature of the treatment,] [the probability of success of such treatment,] [the risk involved in such treatment,] [(other factors in evidence),] and all of the surrounding circumstances.

(Insert name of applicable party) has the burden to prove (insert name of other party)'s failure to exercise ordinary care and the amount of damages, if any, that would have been minimized or avoided.

NOTE ON USE

Use this instruction only if (1) there is evidence creating an issue of fact as to the injured person's failure to exercise ordinary care in receiving or submitting to medical treatment, and (2) the evidence permits a segregation of the damages resulting from that failure to exercise ordinary care.

Use bracketed material as applicable. For issues about avoidable consequences other than failing to secure or submit to medical treatment, see WPI 33.01 (Avoidable Consequences—Personal Injury Generally) or WPI 33.03 (Avoidable Consequences—Property or Business).

COMMENT

RCW 4.22.005 and RCW 4.22.015.

RCW 4.22.005 provides that contributory fault proportionately diminishes the amount of a claimant's recovery. RCW 4.22.015 defines

“fault” as including “unreasonable failure to avoid an injury or to mitigate damages.”

Whether or not reasonable care requires an injured person to submit to the treatment is a jury question. *Martin v. Foss Launch & Tug Co.*, 59 Wn.2d 302, 308, 367 P.2d 981 (1962). The principles relating to the duty of an injured person in the securing of treatment are considered in *Dahl v. Wagner*, 87 Wash. 492, 494–96, 151 P. 1079 (1915); *Hoseth v. Preston Mill Co.*, 49 Wash. 682, 687–89, 96 P. 423 (1908); and *Rowe v. Whatcom Cnty. Ry. & Light Co.*, 44 Wash. 658, 87 P. 921 (1906). See also Shipley, *Duty of Injured Person to Submit to Surgery to Minimize Tort Damages*, 62 A.L.R.3d 9 (1975).

The opinion in *Cox v. Keg Restaurants U.S., Inc.*, 86 Wn.App. 239, 243–48, 935 P.2d 1377 (1997), contains an extended discussion of the sufficiency of evidence required to submit to a jury the issue of a plaintiff’s unreasonable failure to secure treatment. The court noted that where causation turns on “obscure medical factors,” expert testimony is required. “Submitting the issue to the jury without such testimony is improper because the jury is thus invited to reach a result based on speculation and conjecture.” *Cox*, 86 Wn.App. at 244. The court further stated that the issue “should also not be submitted if the evidence shows that a proposed treatment might not be successful or if there is conflicting testimony as to the probability of a cure because it is not unreasonable for a plaintiff to refuse treatment that offers only a possibility of relief.” *Cox*, 86 Wn.App. at 244.

Similarly, in *Hawkins v. Marshall*, 92 Wn.App. 38, 47–48, 962 P.2d 834 (1998), although there was evidence the plaintiff had failed to follow her doctor’s advice, there was no evidence presented that this omission aggravated her condition or delayed her recovery. Accordingly, it was not error to refuse to give this instruction.

Where, however, evidence is presented from which the jury could conclude that plaintiff’s failure to secure treatment was unreasonable and that treatment would have improved or cured plaintiff’s condition, the giving of an instruction on mitigation of damages is proper. *Fox v. Evans*, 127 Wn.App. 300, 304–09, 111 P.3d 267 (2005).

For additional discussion, see the Comments accompanying WPI 33.01 (Avoidable Consequences—Personal Injury Generally) and WPI 33.03 (Avoidable Consequences—Property or Business).

[Current as of April 2021.]

WPI 33.03

AVOIDABLE CONSEQUENCES—PROPERTY OR
BUSINESS

A person who is liable for damages to another person's [property] [business] is not liable for any damages arising after the original [injury] [event] that are proximately caused by failure of the injured person to exercise ordinary care to avoid or minimize such new or increased damages.

(Insert name of applicable party) has the burden to prove (insert name of other party)'s failure to exercise ordinary care and the amount of damages, if any, that would have been minimized or avoided.

NOTE ON USE

Use this instruction only if there is evidence of failure to use ordinary care to minimize existing damage or to prevent further damage. Use bracketed material as applicable.

COMMENT

RCW 4.22.005 and RCW 4.22.015.

RCW 4.22.005 provides that contributory fault proportionately diminishes the amount of a claimant's recovery. RCW 4.22.015 defines "fault" as including "unreasonable failure to avoid an injury or to mitigate damages."

The legal principles involved when there is damage to property or business are considered in *Smith v. King*, 106 Wn.2d 443, 450–52, 722 P.2d 796 (1986); *Ward v. Painters' Local Union No. 300*, 45 Wn.2d 533, 542–43, 276 P.2d 576 (1954); *Bernsen v. Big Bend Elec. Co-op., Inc.*, 68 Wn.App. 427, 433, 435–36, 842 P.2d 1047 (1993); *Harper & Assocs. v. Printers, Inc.*, 46 Wn.App. 417, 423–24, 730 P.2d 733 (1986).

The duty to mitigate damages applies in an action for damages under the Consumer Protection Act, RCW Chapter 19.86. The defendant has the burden of showing that the plaintiff had available alternatives that would have allowed a mitigation of damages. *Young v. Whidbey Island Bd. of Realtors*, 96 Wn.2d 729, 734, 638 P.2d 1235 (1982).

For additional discussion see the Comments accompanying WPI 33.01 (Avoidable Consequences—Personal Injury—Generally) and WPI 33.02 (Avoidable Consequences—Failure to Secure Treatment).

[Current as of April 2021.]

CHAPTER 34

DAMAGES—FUTURE—MORTALITY TABLES

- WPI 34.01 Damages Arising in Future—Extent and Amount
WPI 34.02 Future Economic Damages—Present Cash Value
WPI 34.04 Mortality Table—Limitation on Use
-

WPI 34.01

DAMAGES ARISING IN FUTURE—EXTENT AND AMOUNT

(WITHDRAWN)

[Current as of April 2021.]

WPI 34.02

**FUTURE ECONOMIC DAMAGES—PRESENT CASH
VALUE**

[Any award for future economic damages must be for the present cash value of those damages.]

[Noneconomic damages [such as] [pain and suffering] [disability] [disfigurement] [and] [_____] are not reduced to present cash value.]

“Present cash value” means the sum of money needed now which, if invested at a reasonable rate of return, would equal the amount of loss at the time in the future when [the expenses must be paid] [or] [the earnings would have been received] [or] [the benefits would have been received].

The rate of interest to be applied in determining present cash value should be that rate which in your judgment is reasonable under all the circumstances. In this regard, you should take into consideration the prevailing rates of interest in the area that can reasonably be expected from safe investments that a person of ordinary prudence, but without particular financial experience or skill, can make in this locality.

[In determining present cash value, you may also consider decreases in value of money that may be caused by future inflation.]

NOTE ON USE

This instruction should not be given in the absence of evidence of present cash value.

Use bracketed material as applicable. Use the bracketed paragraph on future inflation only if there is supporting evidence. If the expert witnesses have used an inflation factor as a part of their interest figure, it may be necessary to revise the language on future inflation to be consistent with the evidence of the experts.

The bracketed material relating to pain and suffering should not be used in a wrongful death case. See Comment below.

COMMENT

This instruction is based upon *Kellerher v. Porter*, 29 Wn.2d 650, 666–67, 673–76, 189 P.2d 223 (1948).

Need for definitions and guidelines. It is error to instruct the jury to reduce an award to present cash value without further defining what that term is and how it should be applied. *Bartlett v. Hantover*, 84 Wn.2d 426, 431–32, 526 P.2d 1217 (1974). An instruction is erroneous if it gives the jury no guidelines as to the appropriate rate of interest to apply. *Hinzman v. Palmanteer*, 81 Wn.2d 327, 335–36, 501 P.2d 1228 (1972), disapproved of on other grounds, *Wooldridge v. Woolett*, 96 Wn.2d 659, 666–67, 638 P.2d 566 (1981).

Evidence of the appropriate rate of interest must be presented before jurors are instructed as to discounting damage awards to present cash value. *Snow v. Whitney Fidalgo Seafoods, Inc.*, 38 Wn.App. 220, 230, 686 P.2d 1090 (1984); see also *Mendelsohn v. Anderson*, 26 Wn.App. 933, 939–40, 614 P.2d 693 (1980) (it is not error to refuse to instruct the jury to discount future medical expenses and lost earning capacity to present cash value if no evidence is introduced as to the proper interest rate or mathematical formula).

In *Cornejo v. State*, 57 Wn.App. 314, 325–29, 788 P.2d 554 (1990), the court held that expert testimony as to the value of an annuity was admissible as a way of determining the present cash value of future economic losses. The opinion also cites the former version of WPI 34.02.

Offset. The jury is entitled to know that the reduction of an award to present cash value may be offset by a change in the purchasing power of money if the plaintiff produces evidence of the probable reduced value of money at given periods of time in the future. See *Hinzman*, 81 Wn.2d at 335–36; *Sadler v. Wagner*, 5 Wn.App. 77, 85, 486 P.2d 330 (1971). It is desirable to require expert testimony to prove the present worth of money invested at a given interest rate, because this allows cross examination or opposing expert testimony as to the probable inflationary trend which might offset the discount. *Sadler*, 5 Wn.App. at 83–85 (approving the former version of WPI 34.02).

Pain and suffering. Recovery for the decedent's pain and suffering is precluded under the wrongful death statute, RCW 4.20.010, because wrongful death recoveries are for losses incurred by designated surviving beneficiaries rather than injuries suffered by a decedent.

Related statutes. Under RCW 4.20.046 (the general survival statute), the correct measure of damages is the present value of probable future accumulations to the estate of the deceased. This is calculated by subtracting all probable expenditures of the decedent from the probable gross earnings and reducing the net accumulation to present value. *Wagner v. Flightcraft, Inc.*, 31 Wn.App. 558, 568, 643 P.2d 906 (1982).

RCW 4.56.260, enacted as part of the 1986 Tort Reform Act, requires the court, at the request of a party, to order periodic payments of future damages if those damages exceed \$100,000. In *Esparza v. Skyreach Equipment, Inc.*, 103 Wn.App. 916, 942, 15 P.3d 188 (2000), the Court of Appeals noted that application of this statute in a jury trial would require significant tailoring of the evidence, instructions, and verdict form. Accordingly, a post-trial request for periodic payments was held to be untimely. The court reasoned:

Conversion of future damages to present value and converting present value to gross amounts can involve several judgment calls and determinations of fact. Such judgment calls and determinations of fact should be made by the jury unless the parties can agree to some other means. The parties have a constitutional right to have the jury determine issues of fact. . . .

In order for the jury to properly perform its task, it must hear evidence regarding the judgment calls and determinations of fact that need to be made. It must also be instructed whether to award any future damages at present cash value or some other value. . . .

Each element of future damages accumulates at a different rate, and a single lump-sum figure makes it difficult for a trial court to ascertain how much the jury intended to be for future medical care and how much for future earnings, and what duration of payments the jury found to be appropriate for each kind of future damages. A trial court would have no way of knowing the answers to these questions, absent an appropriate special verdict form, so that any attempt to apply a periodic payment schedule would require arbitrary determinations by the court that could result in under-compensation of the plaintiff or overpayment by the defendant.

Esparza, 103 Wn.App. at 943-44.

[Current as of April 2021.]

WPI 34.04

MORTALITY TABLE—LIMITATION ON USE

According to mortality tables, the average expectancy of life of a _____ aged _____ years is _____ years. This one factor is not controlling, but should be considered in connection with all the other evidence bearing on the same question, such as that pertaining to the health, habits, and activity of the person whose life expectancy is in question.

NOTE ON USE

The current mortality table for use in the State of Washington is included herein as Appendix B. Before the instruction is given to the jury, fill in the first blank with the word “man,” “woman,” “male,” or “female.” Fill in the second blank with the person’s age and the third blank with the life expectancy from the table. Age should be computed as of the nearest birthday. For a death case, use the life expectancy at time of death. For an injury case, use the life expectancy at the time of trial since the issue is future expectancy.

The Washington Insurance Commissioner’s Office should be contacted for the most recent mortality table (www.insurance.wa.gov.)

COMMENT

The giving of this instruction is proper when there is evidence of either permanent injury, future loss of earnings, or future pain and suffering. *Lofgren v. W. Wash. Corp. of Seventh Day Adventists*, 65 Wn.2d 144, 147, 396 P.2d 139 (1964) (although a life expectancy instruction should have been given, refusal to give the instruction was not error because the plaintiff’s attorney included the substance of the instruction in the closing argument to the jury); *Ramirez v. Dimond*, 70 Wn.App. 729, 732–34, 855 P.2d 338 (1993) (mortality table instruction was not improper, when viewed in context of other instructions, given the instruction simply provided additional information to gauge amount of plaintiff’s damages).

The opinion in *Bradshaw v. City of Seattle*, 43 Wn.2d 766, 784, 264 P.2d 265, 42 A.L.R.2d 800 (1953), abrogated on other grounds, *Wuthrich v. King County*, 185 Wn.2d 19, 25–26, 366 P.3d 926 (2016), suggests that the life expectancy figure to be used in the jury instruction should be

taken from the table published by the State Insurance Commissioner pursuant to statute.

[Current as of April 2021.]

CHAPTER 35

EXEMPLARY DAMAGES

WPI 35.01 Exemplary or Punitive Damages

WPI 35.01

EXEMPLARY OR PUNITIVE DAMAGES

(No instruction is set forth.)

COMMENT

Exemplary or punitive damages are generally not recoverable under Washington law unless expressly authorized by statute. *Grays Harbor Cnty. v. Bay City Lumber Co.*, 47 Wn.2d 879, 289 P.2d 975 (1955); *Anderson v. Dalton*, 40 Wn.2d 894, 898, 246 P.2d 853, 35 A.L.R.2d 302 (1952).

Punitive damages are contrary to Washington's public policy. E.g., *Dailey v. N. Coast Life Ins. Co.*, 129 Wn.2d 572, 574, 919 P.2d 589 (1996). The Washington Supreme Court held that the Legislature, in enacting the state Law Against Discrimination (RCW Chapter 49.60), which allows for "any other remedy authorized by . . . the United States Civil Rights Act of 1964 as amended," had not unambiguously manifested an intention to make punitive damages available. *Dailey*, 129 Wn.2d at 575-77.

When federal claims allowing for punitive damages are presented in Washington courts, practitioners and trial judges should consult the Ninth Circuit's manual of model jury instructions. In *Sintra, Inc., v. City of Seattle*, 131 Wn.2d 640, 662, 935 P.2d 555 (1997), the Washington Supreme Court approved the punitive damages instructions given by the trial court on a claim under 42 U.S.C. § 1983. Those instructions informed the jury that punitive damages could be awarded only for conduct that was "malicious or taken in reckless disregard of plaintiffs' rights" and that "punitive damages, if any, should be in an amount sufficient to fulfill their purposes of punishing reprehensible conduct and deterring the defendants and others from similar conduct." *Sintra*, 131 Wn.2d at 662.

The due process clause of the U.S. Constitution requires that punitive damages bear a “reasonable relationship” to compensatory damages.

Unlike the initial damage calculation, determining the constitutional ceiling on a punitive damage award is a question of law, properly reserved for the court. Although states are certainly free to incorporate the reasonable relationship concept into jury instructions, it is also constitutionally permissible for a district court to delay the reasonable relationship inquiry until the judge’s post-verdict review.

White v. Ford Motor Co., 500 F.3d 963, 974 (9th Cir. 2007) (citations omitted).

In Exxon Shipping Co. v. Baker, 554 U.S. 471, 128 S.Ct. 2605, 171 L.Ed.2d 570 (2008) (a case arising under federal maritime jurisdiction), the U.S. Supreme Court expressed its ongoing constitutional concern over the “stark unpredictability” of punitive damage awards. Exxon, 554 U.S. at 499. The Court surveyed several states’ pattern jury instructions on punitive damages before concluding that the exercise left it “skeptical that verbal formulations, superimposed on general jury instructions, are the best insurance against unpredictable outliers.” Exxon, 554 U.S. at 504. Accordingly, sitting in that case as a “common law court of last review,” it ruled in favor of “pegging punitive to compensatory damages using a ratio or maximum multiple.” Exxon, 554 U.S. at 506. It would appear that this mathematical work can be done by the jury, the judge, or a combination of the two.

[Current as of April 2021.]

PART V

MULTIPLE PARTIES AND PLEADINGS— FORMS OF VERDICTS

CHAPTER 41

MULTIPLE PARTIES AND PLEADINGS

- WPI 41.01 Two or More Plaintiffs—Separate Claims
 - WPI 41.03 Two or More Defendants—Different Legal Duties
 - WPI 41.04 Fault to Be Apportioned
 - WPI 41.05 Counterclaim—Cross-Claim—Third-Party Claim
-

WPI 41.01

TWO OR MORE PLAINTIFFS—SEPARATE CLAIMS

You should decide the case of each plaintiff separately as if it were a separate lawsuit. The instructions apply to each plaintiff unless a specific instruction states that it applies only to a specific plaintiff.

NOTE ON USE

Use this instruction in cases in which multiple plaintiffs make separate individual claims.

COMMENT

Washington law and procedure contemplates the potential for joinder of multiple plaintiffs and defendants in the same trial, where the litigation arises out of the same event or subject matter. Where multiple parties and causes of action are joined for trial, care must be taken to avoid the potential for confusion of parties and issues, while at the same time providing instruction on the law as appropriate.

There is no Washington authority precluding use of the term “plaintiff” or “defendant” in lieu of use of the individual names of par-

ties in a jury instruction. A trial court has broad discretion in determining the wording of jury instructions. In re Taylor-Rose, 199 Wn.App. 866, 880, 401 P.3d 357 (2017).

Use of generic references to “plaintiff” or “defendant” in lieu of or in addition to use of individual names of the parties may provide ease of reference and avoid repetition while facilitating understanding and gender neutrality. Giving this instruction eliminates the need for repeating the instructions for each plaintiff. However, care needs to be taken in multiple party cases to use specific instructions as may be required when instructing on the law that may be applicable to a particular plaintiff’s claims or damages.

When plaintiffs are married or are registered domestic partners. While WPI 41.01 applies to all cases involving multiple plaintiffs, often the plaintiffs in such cases are married, or may be domestic partners. Marital community laws are set forth in RCW Chapter 26.16. Presumably, the same principles that apply to marital communities would also apply to state registered domestic partnerships. See, e.g., RCW 26.60.015 (expressing legislative intent that state registered domestic partners shall be treated the same as married spouses for all purposes under state law).

RCW 26.60.015 provides that state registered domestic partners shall be treated the same as married spouses for all purposes under state law. RCW 4.22.020 provides that the contributory fault of one spouse or one domestic partner *shall not be imputed* to the other spouse or other domestic partner or the minor child of the spouse or domestic partner to diminish recovery in an action by the other spouse or other domestic partner or *the minor child* of the spouse or other domestic partner, or his or her legal representative, to recover damages caused by fault resulting in death or in injury to the person or property, whether separate or community, of the spouse or domestic partner.

RCW 4.08.030 provides that either spouse or either domestic partner may sue on behalf of the community. RCW 4.08.040 provides that either spouse or either domestic partner may join in all causes of action arising from injuries to the person or character of either or both of them, or from injuries to the property of either or both of them or arising out of any contract in favor of either or both of them.

In an action for personal injuries, the spouse or domestic partner who sustained personal injuries is a necessary party. RCW 4.08.030(1). When the action is for compensation for services rendered, the spouse or domestic partner who rendered the services is a necessary party. RCW 4.08.030(2). Brown v. Brown, 100 Wn.2d 729, 675 P.2d 1207 (1984),

held that recovery for an injury inflicted upon a married person by a third-party tortfeasor is the separate property of the injured spouse, except to the extent the recovery compensates the community for lost wages which would have been community property, or injury-related expenses that the community incurred.

[Current as of October 2021.]

WPI 41.03

**TWO OR MORE DEFENDANTS—DIFFERENT
LEGAL DUTIES**

You should decide the case of each defendant separately as if it were a separate lawsuit. The instructions apply to each defendant unless a specific instruction states that it applies only to a specific defendant.

NOTE ON USE

The giving of this instruction eliminates the need for repeating instructions as to each defendant. This instruction does not apply if liability of the defendants is joint or if the liability of a defendant depends upon the liability of another, as in a principal and agent situation.

If one set of defendants is a marital community or a state registered domestic partnership, this instruction should be revised to use the names of the defendants. For example: “You should decide the case of the defendants Jones and the case of the defendant Smith as if they were separate lawsuits.”

If the only defendants are a marital community or a state registered domestic partnership, this instruction must not be used.

COMMENT

See the Comments to WPI 41.01 (Two or More Plaintiffs—Separate Claims) and WPI 41.04 (Fault to be Apportioned).

[Current as of September 2021.]

WPI 41.04

FAULT TO BE APPORTIONED

If you find that more than one entity was negligent, you must determine what percentage of the total negligence is attributable to each entity that proximately caused the [injury] [damage] to the plaintiff. The court will provide you with a special verdict form for this purpose. Your answers to the questions in the special verdict form will furnish the basis by which the court will apportion damages, if any.

Entities may include the defendant(s), [the plaintiff(s)] [and] [the person(s) injured] [the person(s) incurring property damage] [third-party defendant(s)] [entity or entities not party to this action].

NOTE ON USE

Use for all actions involving the fault of more than one entity.

Use WPI 21.10 (Burden of Proof—Entities Not Party to the Action) with this instruction, if entities not party to the action have been identified as probably causing the plaintiff's injury or damage.

See WPI Chapter 45 (Forms of Verdicts) for the appropriate verdict form to be used with this instruction.

For a case involving nondelegable duty, see WPI 12.09.

Use bracketed material as applicable.

COMMENT

Statutory background. RCW 4.22.070(1), first enacted as part of the 1986 Tort Reform Act, states in part:

In all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages, except entities immune from liability to the claimant under Title 51 RCW. The sum of the percentages of the total fault attributed to at-fault entities shall equal one hundred percent. The entities whose

fault shall be determined include the claimant or person suffering personal injury or incurring property damage, defendants, third party defendants, entities released by the claimant, entities with any other individual defense against the claimant, and entities immune from liability to the claimant, but shall not include those entities immune from liability to the claimant under Title 51 RCW. Judgment shall be entered against each defendant except those who have been released by the claimant or are immune from liability to the claimant or have prevailed on any other individual defense against the claimant in an amount which represents that party's proportionate share of the claimant's total damages.

Welch v. Southland, 134 Wn.2d 629, 634-37, 952 P.2d 162 (1998), held that the definition of fault found in RCW 4.22.015 applies when apportioning total fault pursuant to RCW 4.22.070.

RCW 4.22.015 defines fault as including acts or omissions that are in "any measure negligent or reckless toward the person or property of the actor or others." RCW 4.22.015 further requires that there be a causal relation between conduct and damages before fault attaches. By incorporating the terms "negligence" and "proximate cause," this instruction reflects that both the definition of fault and the causal relationship requirement set forth in RCW 4.22.015 are applicable to RCW 4.22.070(1).

RCW 4.22.070(1) further provides that the liability of each defendant shall be several unless a party was acting in concert with another party or person (see WPI 50.20 et seq.), or when a person was acting as an agent or servant of the party, or the trier of fact determines the claimant or party suffering bodily injury or incurring property damages was not at fault. If it is determined that the claimant or the person injured or damaged was not at fault, the defendants against whom judgment is entered are jointly and severally liable for the sum of their proportionate shares of the claimant's total damages.

Actions re: hazardous or solid waste disposal sites exempt. RCW 4.22.070 does not apply to actions relating to hazardous or solid waste disposal sites, actions arising from the tortious interference with contracts or business relations, or actions arising from the manufacture or marketing of a fungible product in a generic form which contains no clearly identifiable shape, color, or marking. RCW 4.22.070(3).

Immunity. Shelton v. Azar, Inc., 90 Wn.App. 923, 929-31, 954 P.2d 352 (1998), held that under RCW 4.22.070 a trier of fact may not assign fault to an entity immune from liability under the exclusive remedy provisions of the Industrial Insurance Act. A similar result was reached

in *Thoen v. CDK Construction Services, Inc.*, 13 Wn.App.2d 174, 466 P.3d 261 (2020), where the Court of Appeals held that the trier of fact could not assign fault to a subcontractor who was immune from liability under the Industrial Insurance Act.

Gilbert H. Moen Co. v. Island Steel Erectors, Inc., 128 Wn.2d 745, 912 P.2d 472 (1996), held that a general contractor can be indemnified by the subcontractor to the extent of the subcontractor's negligence for payments required to be made for injuries to the subcontractor's employee pursuant to an indemnification agreement meeting the requirements of RCW 4.24.115(1)(b), provided that the subcontractor expressly waives immunity under industrial insurance, Title 51, and such waiver was mutually negotiated by the parties. Accord, *Vargas v. Inland Wash. LLC*, 194 Wn.2d 720, 742–43, 452 P.3d 1205 (2019).

For a discussion of the method of apportioning damages under RCW 4.22.070 when there is a defendant who settles or a defendant who is immune from judgment, see *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 294, 840 P.2d 860 (1992); *Gerrard v. Craig*, 122 Wn.2d 288, 857 P.2d 1033 (1993).

Workplace safety. Washington courts have held that property owners, subcontractors, and general contractors may have non-delegable duties to provide a safe workplace, in addition to “direct” and “vicarious” liability for work site accidents. Particular care should be taken in these circumstances to instruct the jury as to common law and statutory duties, proximate causation, and allocation of fault as may be appropriate under the facts of a given case. See, e.g., *Vargas*, 194 Wn.2d at 730–31 (general contractor); *Afoa v. Port of Seattle*, 191 Wn.2d 110, 115, 421 P.3d 903 (2018) (property owner); *Thoen*, 13 Wn.App. 2d 174 (general contractor). See discussions in WPI 50.11 (Independent Contractor—Definition) and WPI 12.09 (Nondelegable Duties).

For further discussion, see *DeWolf & Allen*, 16 Washington Practice, Tort Law and Practice § 4:15 (5th ed).

Raising the allocation issue. In *Adcox v. Children's Orthopedic Hospital and Medical Center*, 123 Wn.2d 15, 25–26, 864 P.2d 921 (1993), the court stated:

RCW 4.22.070 is not self-executing. It does not automatically apply to each case where more than one entity could theoretically be at fault. Either the plaintiff or the defendant must present evidence of another entity's fault to invoke the statute's allocation procedure. Without a claim that more than one party is at fault, and sufficient evidence to support that claim, the trial judge cannot submit the is-

sue of allocation to the jury. Indeed, it would be improper for the judge to allow the jury to allocate fault without such evidence. If the plaintiff signals an intention to present evidence of fault solely against one defendant, as in this case, it is incumbent upon the defendant to provide proof that more than one entity was at fault.

See also *Henderson v. Tyrrell*, 80 Wn.App. 592, 910 P.2d 522 (1996).

Under RCW 4.22.070(1), any party to a proceeding can assert that another person is at fault. *Adcox*, 123 Wn.2d at 25; *Mailloux v. State Farm Mut. Auto. Ins. Co.*, 76 Wn.App. 507, 511, 887 P.2d 449 (1995). Only the plaintiff, however, can assert that another person is liable to the plaintiff. *Mailloux*, 76 Wn.App. at 511. If no one proves fault, the other person is neither at fault nor liable to the plaintiff. *Adcox*, 123 Wn.2d at 25–26; *Mailloux*, 76 Wn.App. at 511. If the plaintiff proves that a party's fault is a proximate cause of the plaintiff's damages, the party at fault is also liable to the plaintiff, and judgment is entered as set forth in the statute. *Mailloux*, 76 Wn.App. at 511–12.

If a party other than the plaintiff proves fault that is a proximate cause of the plaintiff's damages, the person at fault is not liable to the plaintiff—the plaintiff has made no claim against him or her, but his or her fault nevertheless operates to reduce the proportionate share of damages that the plaintiff can recover from those against whom the plaintiff has claimed. *Mailloux*, 76 Wn.App. at 512. A person is not liable to the plaintiff, much less jointly and severally, if he or she has not been named by the plaintiff. *Mailloux*, 76 Wn.App. at 511.

Single defendant. In *Anderson v. City of Seattle*, 123 Wn.2d 847, 873 P.2d 489 (1994), the court held that, in an action in which the claimant or damaged party is not at fault, joint and several liability does not arise under RCW 4.22.070(1)(b) unless two or more defendants have a final judgment entered against them. If a final judgment is entered in such an action against a single defendant, then the defendant is severally liable for its proportionate share of fault regardless of whether fault is apportioned among others. *Anderson*, 123 Wn.2d at 852; see also *Kottler v. State*, 136 Wn.2d 437, 963 P.2d 834 (1998).

Children. In *Price v. Kitsap Transit*, 125 Wn.2d 456, 886 P.2d 556 (1994), the court held that children under six years of age are incapable of fault as that term is used in RCW 4.22.070(1) and are not entities to whom fault may be apportioned under the statute. In *Smelser v. Paul*, 188 Wn.2d 648, 398 P.3d 1086 (2017), the Washington Supreme Court held that no tort action exists under Washington law for negligent supervision of a child by a parent. Therefore, an award to the parents for injury to their child could not be offset by the jury's apportionment

of 50 percent fault to the father for negligent supervision. Where no tort exists, no legal duty could be breached and no fault of the parent could be attributed or apportioned under RCW 4.22.070(1). Smelser, 188 Wn.2d at 656.

Intentional acts. In *Welch v. Southland Corp.*, 134 Wn.2d 629, 952 P.2d 162 (1998), the court held that intentional acts are not included in the statutory definition of fault. Therefore, a negligent tortfeasor cannot apportion liability to an intentional tortfeasor. *Tegman v. Accident & Med. Investigations, Inc.*, 150 Wn.2d 102, 111–19, 75 P.3d 497 (2003); *Welch*, 134 Wn.2d at 634–37. *Tegman* requires that a jury segregate damages caused by intentional tortfeasors from those caused by negligent tortfeasors. *Tegman*, 150 Wn.2d at 115–17. An intentional tortfeasor can still be found to be the sole proximate cause of an injury or event. For further discussion of *Tegman* and related issues, see the Comment to WPI 15.04 (Negligence of Defendant Concurring with Other Causes).

In *Porter v. Kirkendoll*, 194 Wn.2d 194, 208–09, 449 P.3d 627 (2019), the Washington Supreme Court held that timber trespass is not an intentional tort. Strict liability applies to timber trespass, including a right to contribution under RCW 4.22.015.

Entities not identified in statute. In *In re Arbitration of Fortin*, 82 Wn.App. 74, 914 P.2d 1209 (1996), overruled on other grounds by *Price v. Farmers Insurance Company of Washington*, 133 Wn.2d 490, 946 P.2d 388 (1997), the court, citing RCW 4.22.070(1), held that the Legislature did not intend to limit the attribution of fault to only those entities specifically identified in the statute. The court in *Fortin* further concluded that phantom drivers are entities to which fault may be attributed. *Fortin*, 82 Wn.App. at 85.

For discussions of various issues arising under RCW 4.22.070, see generally *Estes, Contribution, Indemnification, and Subrogation after Washington's Tort Reform Acts*, 21 Seattle U. L.Rev. 69 (1997); *Sisk, Comparative Fault and Common Sense*, 30 Gonzaga L. Rev. 29 (1994); *Weaver, Jury Instructions on Joint and Several Liability in Washington State*, 67 Wash. L. Rev. 457 (1992); *Peck, Washington's Partial Rejection and Modification of the Common Law Rule of Joint and Several Liability*, 62 Wash. L. Rev. 233 (1987).

[Current as of October 2021.]

WPI 41.05**COUNTERCLAIM—CROSS-CLAIM—THIRD-PARTY
CLAIM**

There are multiple claims in this case. The instructions apply to all claims unless a specific instruction states that it applies only to a specific claim.

NOTE ON USE

This instruction should be given after an instruction on the issues from WPI Chapter 20 (Issues in the Case).

COMMENT

Practitioners should carefully review the other written instructions to make sure that any instruction that applies to fewer than all claims clearly states this limitation. Special attention should be paid to the instructions setting out the issues in the case (see WPI Chapter 20) and the burden of proof (see WPI Chapter 21). See also the Comments to WPI 41.01 (Two or More Plaintiffs—Separate Claims) and WPI 41.04 (Fault to be Apportioned).

[Current as of September 2021.]

PART VI

AGENCY AND PARTNERSHIP—TORTS

CHAPTER 50

AGENCY AND PARTNERSHIP—TORTS

WPI 50.00	Introduction
WPI 50.01	Agent and Principal—Definition
WPI 50.02	Agent—Scope of Authority Defined
WPI 50.02.01	Agent—Scope of Apparent Authority Defined
WPI 50.03	Act of Agent Is Act of Principal
WPI 50.04	Both Principal and Agent Sued—No Issue As to Agency or Authority
WPI 50.05	Principal Sued But Not Agent—No Issue As to Agency or Authority
WPI 50.07	Principal Sued But Not Agent—Agency or Authority Denied
WPI 50.10	Deviation From Authority
WPI 50.11	Independent Contractor—Definition
WPI 50.11.01	Distinguishing Between Agents and Independent Contractors
WPI 50.12	Partnership—Definition
WPI 50.13	Partnership—Scope of Partnership Business Defined
WPI 50.14	Act of Partner Is Act of All Partners
WPI 50.18	Corporation Acts Through Its Employees—No Issue As to Scope of Agency
WPI 50.20	Acting in Concert—RCW 4.22.070—Definition

WPI 50.00

INTRODUCTION

Scope of chapter. The instructions are intended for use in tort actions in which plaintiff seeks to establish the vicarious liability of a principal for the tortious conduct of an agent committed while acting within the scope of employment. Liability in these situations is founded upon the maxim of “respondeat superior.”

This chapter does not cover the following: (1) actions based on

contract law or other non-tort theories of recovery; (2) actions based on tort theories other than respondeat superior (such as an employer's negligent supervision of employees); or (3) actions between principals and agents. The instructions contained in this Chapter 50 were not drafted to do double or multiple duty. If at times they can be so used, this is purely coincidental and requires the exercise of caution.

Instructing jurors in terms of “principal and agent.” The instructions in this chapter use the terms “principal and agent” instead of “master and servant.” The WPI Committee believes that the definition of “principal and agent” in WPI 50.01 is easily grasped by jurors. In a case involving a traditional employment relationship, however, the terms “employer and employee” might be clearer. The Restatement (Second) of Agency uses the terms “principal and agent” and “master and servant” in a technical sense to distinguish agents in general from the agents for whose acts vicarious responsibility will lie. See Restatement (Second) of Agency §§ 1, 2, 219, 220, 250 (1958). The Comments in this chapter, however, may reflect the terminology used in the cases being discussed. Like the Restatement (Third) of Agency, the Washington Pattern Jury Instructions no longer use the phrase “master and servant.” See Restatement (Third) of Agency §§ 1.01-.02, 2.04, 7.07-.08 (2006).

Organization of chapter. This chapter contains general instructions defining an agent (WPI 50.01), defining scope of authority (WPI 50.02) and advising the jury of the legal effect thereof (WPI 50.03). There are also more specific instructions, WPI 50.04-.07, aimed at giving the jury direction in returning verdicts against the proper defendants in varying situations of liability. If the more specific instructions are used, make sure they fit the particular case. It may be necessary to vary the language of these instructions.

The same is true for partnership cases. The general instructions are WPI 50.12 (Partnership—Definition), WPI 50.13 (Partnership—Scope of Partnership Business Defined), and WPI 50.14 (Act of Partner is Act of all Partners), and the specific instructions are WPI 50.15 (Partner—Liability of—No Issue as to Partnership, Agency, or Scope of Authority), WPI 50.16 (Partnership—Existence Admitted—Scope of Partnership Business in Issue—Effect), and WPI 50.17 (Partnership—Existence of Partnership in Issue—Effect). Pattern instructions cannot fit all cases. Their purpose is to present a pattern to be adapted as needed.

This chapter also contains instructions (WPI 50.20 through 50.24) for actions in which there is an issue whether a defendant was acting in concert with another party or person. See RCW 4.22.070(1).

[Current as of November 2021.]

WPI 50.01

AGENT AND PRINCIPAL—DEFINITION

An agent is a person employed under an express or implied agreement to perform services for another, called the principal, and who is subject to the principal's control or right to control the manner and means of performing the services. [One may be an agent even though he or she receives no payment for services.] [The agency agreement may be oral or in writing.]

NOTE ON USE

Use bracketed material as applicable. For the scope of this instruction, see WPI 50.00 (Introduction).

Use this instruction only when there is an issue as to the existence of agency. Use WPI 50.03 (Act of Agent is Act of Principal) with this instruction. If the issue is whether the agent was acting within the scope of authority, use WPI 50.02 (Agent—Scope of Authority Defined). If the issue is whether a person is an agent or independent contractor, use WPI 50.11 (Independent Contractor—Definition) and 50.11.01 (Distinguishing Between Agents and Independent Contractors) along with this instruction.

COMMENT

Characteristics of agency relationship. The essential elements of an agency relationship are control over the manner in which the work is performed and consent. *Yong Tao v. Heng Bin Li*, 140 Wn.App. 825, 831, 166 P.3d 1263 (2007); *O'Brien v. Hafer*, 122 Wn.App. 279, 283, 93 P.3d 930 (2004). The definitions of agent and employee have been approved in many Washington cases. See, e.g., *CKP, Inc. v. GRS Constr. Co.*, 63 Wn.App. 601, 607–08, 821 P.2d 63 (1991) (definition of agent); *Chapman v. Black*, 49 Wn.App. 94, 98–99, 741 P.2d 998 (1987) (definition of employee); *Hollingbery v. Dunn*, 68 Wn.2d 75, 79–81, 411 P.2d 431 (1966) (definition of employee).

In the absence of actual exercise of control, a principal-agent relationship exists if the principal has the right of control over the manner and means by which the work is accomplished. *Chapman*, 49 Wn.App. at 99 (the right of control is the “crucial factor”); *O'Brien*, 122 Wn.App. at 283 (same). For a more detailed discussion of the significance of the

right to control in distinguishing between agents and independent contractors, see *Massey v. Tube Art Display, Inc.*, 15 Wn.App. 782, 786–87, 551 P.2d 1387 (1976); *McLean v. St. Regis Paper Co.*, 6 Wn.App. 727, 729–30, 496 P.2d 571 (1972); Comment to WPI 50.11 (Independent Contractor).

Both the principal and the agent must consent to the relationship. *O'Brien*, 122 Wn.App. at 283; *Stansfield v. Douglas Cnty.*, 107 Wn.App. 1, 17, 27 P.3d 205 (2001).

An agency may be express or implied. See *King v. Riveland*, 125 Wn.2d 500, 507, 886 P.2d 160 (1994); *Barker v. Skagit Speedway, Inc.*, 119 Wn.App. 807, 814, 82 P.3d 244 (2003); *Stansfield*, 107 Wn.App. at 17–18.

An agent need not be paid for services in order to qualify as an agent. *Coombs v. R. D. Bodle Co.*, 33 Wn.2d 280, 285, 205 P.2d 888 (1949); *Baxter v. Morningside, Inc.*, 10 Wn.App. 893, 896–97, 521 P.2d 946 (1974).

Factual issues. Whether an agency relationship exists depends on a variety of factual issues. See *Yong*, 140 Wn.App. at 831 (“The existence of agency always depends on the facts and circumstances of each case.”); *Stansfield*, 107 Wn.App. at 18; see also WPI 50.11.01 (Distinguishing Between Agents and Independent Contractors) (list of ten factors to consider).

If there are conflicts in the evidence whether the relationship between the parties was a principal-agent relationship or an independent contractor relationship, or if the evidence is reasonably susceptible of more than one inference, the question is one of fact for the jury. If the evidence is undisputed, the question is one of law and left to the court for its determination. See *Chapman*, 49 Wn.App. at 99 (trial court erred in granting a motion for judgment N.O.V. on the issue of agency and control because the evidence was in conflict); *O'Brien*, 122 Wn.App. at 284.

Loaned employees. In *Jones v. Halvorson-Berg*, 69 Wn.App. 117, 121–23, 847 P.2d 945 (1993), the court discussed in detail the factors useful to determine if an employee is “loaned” by one employer to another. An employee may become the loaned agent of another by submitting to the direction and control of the other with respect to a particular transaction or piece of work. However, unless it appears that the employee has expressly, or by implication, consented to the transfer of his or her services to the new employer, and unless the lender surrenders and the borrower assumes the power of supervision and control, the employee has not become a loaned agent.

For a more detailed discussion of issues relating to agency relationships, see DeWolf & Allen, 16 Washington Practice, Tort Law & Practice §§ 4.10–.17 (5th ed.).

[Current as of November 2021.]

WPI 50.02

AGENT—SCOPE OF AUTHORITY DEFINED

One of the issues for you to decide is whether (agent's name) was acting within the scope of authority.

An agent is acting within the scope of authority if the agent is performing duties that were expressly or impliedly assigned to the agent by the principal or that were expressly or impliedly required by the contract of employment. [Likewise, an agent is acting within the scope of authority if the agent is engaged in the furtherance of the principal's interests.]

NOTE ON USE

For the scope of this instruction, see WPI 50.00 (Introduction).

Use this instruction when there is an issue as to the scope of authority. Use WPI 50.03 (Act of Agent is Act of Principal) with this instruction.

Use the bracketed sentence when it would help the jury determine the proper scope of authority.

COMMENT

In 2011, the Washington Supreme Court stated this test for scope of authority is "well-settled." *Rahman v. State*, 170 Wn.2d 810, 815, 246 P.3d 182 (2011). In *McGrail v. Department of Labor and Industries*, 190 Wash. 272, 277, 67 P.2d 851 (1937), the court held:

The test for determining whether an employee is, at a given time, in the course of his employment, is whether the employee was, at the time, engaged in the performance of the duties required of him by his contract of employment or by the specific direction of his employer, or, as sometimes stated, whether he was engaged at the time in the furtherance of the employer's interests.

See also *Dickinson v. Edwards*, 105 Wn.2d 457, 467, 716 P.2d 814 (1986); *Bratton v. Calkins*, 73 Wn.App. 492, 498, 870 P.2d 981 (1994).

It is the general rule that a principal may be held liable for the tor-

tious acts of the agent if such acts are done within the scope of employment, although the principal may not know or approve of them. See *Titus v. Tacoma Smeltermen's Union Local No. 25*, 62 Wn.2d 461, 469, 383 P.2d 504 (1963). Whether acts are committed within the scope of employment is ordinarily a question for the jury. *Gilliam v. Dep't of Social & Health Servs.*, 89 Wn.App. 569, 585, 950 P.2d 20 (1998) (citing WPI 50.02).

Vicarious liability does not extend to acts committed by an employee who is pursuing his or her own personal interests rather than the employer's, even if the acts were committed during the course of employment. See *Niece v. Elmview Grp. Home*, 131 Wn.2d 39, 48, 929 P.2d 420 (1997); *Smith v. Sacred Heart Med. Ctr.*, 144 Wn.App. 537, 543, 184 P.3d 646 (2008); *Thompson v. Everett Clinic*, 71 Wn.App. 548, 553, 860 P.2d 1054 (1993).

If an employee was acting outside the scope of employment, although the employer may not be vicariously liable for the tortious acts, the employer may still be liable under other theories, such as negligent training or supervision of employees. See *Anderson v. Soap Lake Sch. Dist.*, 191 Wn.2d 343, 360–66, 423 P.3d 197 (2018); *Niece*, 131 Wn.2d at 48; *Thompson*, 71 Wn.App. at 553.

[Current as of November 2021.]

WPI 50.02.01

**AGENT—SCOPE OF APPARENT AUTHORITY
DEFINED**

One of the issues for you to decide is whether (agent's name) was acting within the scope of apparent authority. Apparent authority may only be inferred from the words or conduct of (principal's name). Apparent authority cannot be inferred from the words or conduct of (agent's name).

To establish that (agent's name) was acting within the scope of apparent authority, the plaintiff has the burden of proving each of the following propositions:

First, that the words or conduct of (principal's name) conveyed to the plaintiff that (agent's name) had the authority to perform the particular act on (principal's name)'s behalf;

Second, that the words or conduct of (principal's name) actually led the plaintiff to believe that (agent's name) had the authority to so act; and

Third, that the words or conduct of (principal's name) would have led a reasonably careful person under the circumstances to believe that (agent's name) had the authority to so act.

NOTE ON USE

For the scope of this instruction, see WPI 50.00 (Introduction).

Use this instruction when there is an issue as to apparent authority. Use WPI 50.03 (Act of Agent is Act of Principal) with this instruction.

COMMENT

This instruction is derived from *King v. Riveland*, 125 Wn.2d 500, 507, 886 P.2d 160 (1994), and *State v. French*, 88 Wn.App. 586, 595–96, 945 P.2d 752 (1997). In order to make the instruction easier for jurors to understand, WPI 50.02.01 was drafted using “words and conduct” instead of the “obvious manifestations” terminology that is found in

these cases. No change in meaning is intended with this simplified terminology.

An agent's apparent authority to bind a principal is determined based on the words or conduct of the principal toward a third party. King, 125 Wn.2d at 507; French, 88 Wn.App. at 595. In this respect, apparent authority differs from actual authority, which is determined based on the words or conduct of the principal toward the agent. See Comment to WPI 50.02 (Agent—Scope of Authority Defined).

Apparent authority may not be inferred from the acts of the agent. French, 88 Wn.App. at 595; Hansen v. Horn Rapids O.R.V. Park, 85 Wn.App. 424, 430, 932 P.2d 724 (1997).

Apparent authority involves both subjective and objective elements. The third party must actually believe, based on the principal's words or conduct, that the principal authorized the agent to act, and this belief must be reasonable. King, 125 Wn.2d at 507; French, 88 Wn.App. at 595-96; Hansen, 85 Wn.App. at 430.

[Current as of November 2021.]

WPI 50.03

ACT OF AGENT IS ACT OF PRINCIPAL

Any act or omission of an agent within the scope of [apparent] authority is the act or omission of the principal.

NOTE ON USE

For the scope of this instruction, see WPI 50.00 (Introduction).

Depending on the questions in issue, use this instruction with one or more of the following instructions: WPI 50.01 (Agent and Principal—Definition), WPI 50.02 (Agent—Scope of Authority Defined), or WPI 50.02.01 (Agent—Scope of Apparent Authority Defined).

Use the bracketed language as appropriate.

COMMENT

A principal may generally be held liable for the tortious acts of the agent if such acts are performed within the scope of employment, although the principal may not know or approve of them. *Titus v. Tacoma Smeltermen's Union Local No. 25*, 62 Wn.2d 461, 469, 383 P.2d 504 (1963) (citing Restatement (Second) of Agency § 219 (1958)).

The principal is held vicariously liable if the agent's acts were committed within the scope of either actual or apparent authority. Actual and apparent authority are distinct concepts:

An agent's authority to bind his principal may be of two types: actual or apparent. Actual authority may be express or implied. Implied authority is actual authority, circumstantially proved, which the principal is deemed to have actually intended the agent to possess. Both actual and apparent authority depends upon objective manifestations made by the principal. With actual authority, the principal's objective manifestations are made to the agent; with apparent authority, they are made to a third person.

King v. Riveland, 125 Wn.2d 500, 507, 886 P.2d 160 (1994) (citations omitted).

[Current as of November 2021.]

WPI 50.04

**BOTH PRINCIPAL AND AGENT SUED—NO ISSUE
AS TO AGENCY OR AUTHORITY**

(Name of principal) and (name of agent) are sued as principal and agent. (Principal's name) is the principal and (agent's name) is the agent. If you find (agent's name) is liable, then you must find that (principal's name) is also liable. However, if you do not find that (agent's name) is liable, then (principal's name) is not liable.

NOTE ON USE

For the scope of this instruction, see WPI 50.00 (Introduction).

This instruction may be used if it fits the issues in the case or may be adapted to fit the facts of the case. If a more general instruction is needed, see WPI 50.01 (Agent and Principal—Definition), WPI 50.02 (Agent—Scope of Authority Defined), WPI 50.02.01 (Agent—Scope of Apparent Authority Defined), and WPI 50.03 (Act of Agent is Act of Principal). See WPI 50.00 (Introduction).

Do not use this instruction if the fact of agency is in issue. If agency is denied and both principal and agent are sued, use WPI 50.06 (Both Principal and Agent Sued—Agency or Authority Denied). If agency is denied and the principal only is sued, use WPI 50.07 (Principal Sued But Not Agent—Agency or Authority Denied).

The last sentence of the instruction will need to be modified for any case in which there is a basis for imposing liability on the principal other than vicarious liability. See discussion in the Comment.

COMMENT

The principal is liable for the negligence of the agent. See Comment to WPI 50.03 (Act of Agent is Act of Principal).

A verdict exonerating the agent also exonerates the principal of vicarious liability arising from the acts of the agent. *Brink v. Martin*, 50 Wn.2d 256, 258, 310 P.2d 870 (1957); *Hansch v. Hackett*, 190 Wash. 97, 102, 66 P.2d 1129 (1937); *Morris v. Nw. Imp. Co.*, 53 Wash. 451, 453, 102 P. 402 (1909).

If there is some other basis for holding the employer liable for the employer's own acts, such as the negligent supervision of employees,

the employer will not necessarily escape all liability. See, e.g., *Niece v. Elmview Grp. Home*, 131 Wn.2d 39, 48, 929 P.2d 420 (1997) (an employer's liability under respondeat superior is "entirely independent" of actions for negligent hiring, retention, and supervision).

[Current as of November 2021.]

WPI 50.05

**PRINCIPAL SUED BUT NOT AGENT—NO ISSUE AS
TO AGENCY OR AUTHORITY**

(Agent's name) **was the agent of** (principal's name), **and, therefore,**
any act or omission of the agent was the act or omission
of (principal's name).

NOTE ON USE

For the scope of this instruction, see WPI 50.00 (Introduction).

Do not use this instruction if the fact of agency is in issue. If agency is denied and the principal only is sued, see WPI 50.07. If agency is denied and both principal and agent are sued, see WPI 50.06. Do not use this instruction if the scope of authority is denied. In that event use WPI 50.02 (Agent—Scope of Authority Defined) or WPI 50.02.01 (Agent—Scope of Apparent Authority Defined).

COMMENT

If the agent is not negligent, the principal is not vicariously liable. *Brink v. Martin*, 50 Wn.2d 256, 258, 310 P.2d 870 (1957) (agent was dismissed by the trial court).

[Current as of November 2021.]

WPI 50.07

**PRINCIPAL SUED BUT NOT AGENT—AGENCY OR
AUTHORITY DENIED**

[(Principal's name) is sued as the principal and the plaintiff claims that (agent's name) was acting as an agent. (Principal's name) [denies that (agent's name) was acting as an agent and] [admits that (agent's name) was acting as an agent but denies that the agent] was acting within the scope of authority.]

If you find that (agent's name) [was the agent of (principal's name) and] was acting within the scope of authority, then any act or omission of (agent's name) was the act or omission of (name of principal).

If you do not find that (agent's name) was acting [as the agent of (principal's name) or] within the scope of authority, then (principal's name) is not liable.

NOTE ON USE

For the scope of this instruction, see WPI 50.00 (Introduction).

Use bracketed material as applicable. The entire bracketed first paragraph may be omitted from this instruction and included instead in the statement of the claims and issues in WPI 20.01 (Issues).

If the instruction is not suitable, see WPI 50.06 (Both Principal and Agent Sued—Agency or Authority Denied) or the more general instructions, WPI 50.01 (Agent and Principal—Definition), WPI 50.02 (Agent—Scope of Authority Defined), WPI 50.02.01 (Agent—Scope of Apparent Authority Defined), and WPI 50.03 (Act of Agent is Act of Principal).

Use WPI 50.01 (Agent and Principal—Definition) with this instruction.

Use this instruction only when there is an issue as to agency. If there is no issue as to agency and the principal only is sued, use WPI 50.05 (Principal Sued But Not Agent—No Issue as to Agency or Authority). If there is no issue as to agency and both principal and agent are sued, use WPI 50.04 (Both Principal and Agent Sued—No Issue as to Agency or Authority).

COMMENT

In *Titus v. Tacoma Smeltermen's Union Local No. 25*, 62 Wn.2d 461, 469, 383 P.2d 504 (1963), the court held that a union may be liable for assaults committed by its members while picketing, providing it is done in the furtherance of the union's business and within the scope of employment. The court stated that it is the general rule that a master may be held liable for the tortious acts of his servant, although he may not know or approve of them, if such acts are done within the scope of the employment. *Titus*, 62 Wn.2d at 469.

In *Nelson v. Broderick & Bascom Rope Co.*, 53 Wn.2d 239, 332 P.2d 460 (1958), the principal was sued but not the agent. The principal was not held liable for the acts of the agent committed at a time when the agent "was not furthering his master's business or acting in any manner pursuant to his master's authority at the time the injury was inflicted." *Nelson*, 53 Wn.2d at 242.

[Current as of November 2021.]

WPI 50.10

DEVIATION FROM AUTHORITY

(No special instruction is set forth.)

COMMENT

No pattern instruction is feasible. Whether an agent's deviation from the scope of authority is so substantial that the principal should not be held liable for the actions of the agent depends on many circumstances, which vary widely from case to case. See the Comment to WPI 50.02 (Agent—Scope of Authority Defined).

[Current as of November 2021.]

WPI 50.11

INDEPENDENT CONTRACTOR—DEFINITION

An independent contractor is a person who undertakes to perform work for another but who is not subject to that other person's control of, or right to control, the manner or means of performing the work.

One who engages an independent contractor is not liable to others for the negligence of the independent contractor.

NOTE ON USE

For the scope of this instruction, see WPI 50.00 (Introduction).

Use this instruction along with WPI 50.01 (Agent and Principal—Definition) and WPI 50.11.01 (Distinguishing Between Agent and Independent Contractor) when there is an issue whether a person is an agent or an independent contractor. This instruction is designed for tort cases only.

Do not use this instruction in cases in which the duty is nondelegable. See discussion below and WPI 12.09 (Nondelegable Duties) for a discussion of work site safety.

Do not use this instruction for a case in which a litigant is prohibited from denying responsibility for the act of the person engaged, whether the person hired is an employee, agent, or independent contractor.

COMMENT

Generally, a principal is liable for the negligence of an agent performing within the course and scope of employment, but not for the negligence of an independent contractor. See *DeWater v. State*, 130 Wn.2d 128, 137, 921 P.2d 1059 (1996). In light of recent case law on this topic (see discussion of workplace safety below and in the Comment to WPI 12.09 (Nondelegable Duty)), care should be taken in drafting instructions under circumstances involving workplace safety.

The essential difference between the two relationships is the control over, or right to control, the manner or means of performing the work.

If the employer or principal exercises or retains the right of control over the manner or means by which the work is to be performed, then the one performing the work is an agent. On the other hand, if the principal exercises or retains only the right to control the result of the work and not the manner or means by which it is to be accomplished, then the one performing the work is an independent contractor. See generally *Hollingbery v. Dunn*, 68 Wn.2d 75, 79–80, 411 P.2d 431 (1966); *DeWolf & Allen*, 16 Washington Practice, Tort Law and Practice § 4.12 (5th ed.).

The relationship of an independent contractor to the principal is not affected because the principal reserves the right to supervise the work merely to determine contract compliance. *Epperly v. City of Seattle*, 65 Wn.2d 777, 785, 399 P.2d 591 (1965).

For the factors or elements that should be taken into consideration in determining whether one is an agent (employee) or an independent contractor, see WPI 50.11.01 (Distinguishing Between Agents and Independent Contractors).

Many fact-specific exceptions exist to the rule exempting a contracting party for the negligence of an independent contractor. See *DeWolf & Allen*, 16 Washington Practice, Tort Law and Practice § 4.15 (5th ed.); Restatement (Second) of Torts § 409 cmt. b (1965); *Kelley v. Howard S. Wright Constr. Co.*, 90 Wn.2d 323, 330–34, 582 P.2d 500 (1978) (discussing three exceptions).

See the Comment to WPI 50.01 (Agent and Principal—Definition), for a discussion concerning when the question of an independent contractor relationship should go to the jury.

Worksite safety. The Washington Supreme Court found that a general contractor had a nondelegable duty to provide a safe workplace for all persons. *Vargas v. Inland Wash. LLC*, 194 Wn.2d 720, 731–34, 452 P.3d 1205 (2019); *Thoen v. CDK Constr. Servs. Inc.*, 13 Wn.App. 2d 174, 466 P.3d 261 (2020). Because these cases involved specific facts, regulations, and legal issues, it is difficult at this time to develop pattern jury instructions or verdict forms on the topic of worksite safety. In addition, it may be that a trial court will resolve, as a matter of law, that a nondelegable duty exists with respect to worksite safety. In that situation, it is possible that the trial court will leave issues of breach of duty, proximate causation, and damages to the jury as a finder of fact. Obligations imposed by regulation should be addressed consistent with WPI Chapter 60 (Statutory Violations). Existing instructions on negligence, proximate cause, and damages will be applicable, along with Part V (Multiple Parties and Pleadings—Forms of Verdicts) and may be modified to reflect the parties and issues in a particular case.

[Current as of November 2021.]

WPI 50.11.01

**DISTINGUISHING BETWEEN AGENTS AND
INDEPENDENT CONTRACTORS**

You must decide whether (entity A) was an agent or an independent contractor when performing work for (entity B). This decision requires you to determine whether (entity B) controlled, or had the right to control, the details of (entity A)'s performance of the work.

[In deciding control or right to control, you should consider all the evidence bearing on the question, and you may consider the following factors, among others:

- (1) the extent to which, by their agreement, (entity B) could exercise control over the details of performance of the work by (entity A);**
- (2) whether or not (entity A) was engaged in a distinct occupation or business;**
- (3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of an employer or by a specialist without supervision;**
- (4) the skill required in the particular occupation;**
- (5) whether (entity A) or (entity B) supplied the [tools] [equipment] [instrumentalities] and place of work for the person doing the work;**
- (6) the length of time for which (entity A) was performing work for (entity B);**
- (7) the method of payment, whether by the time or by the job;**

- (8) whether or not the work was part of the regular business of (entity B);
- (9) whether or not (entity A) and (entity B) believed they were creating an employment relationship or an independent contractor relationship; and
- (10) whether (entity B) was or was not in business.

These factors are of varying importance. All the factors do not need to be present for you to make your decision.]

NOTE ON USE

For the scope of this instruction, see WPI 50.00 (Introduction).

When a person's status as an agent or an independent contractor is in dispute, use this instruction along with WPI 50.01 (Agent and Principal—Definition), and WPI 50.11 (Independent Contractor).

Do not use this instruction to determine application of RCW Chapter 49.46, the Washington Minimum Wage Act. See Comment below.

Fill in the blanks with the appropriate names.

The instruction may be modified to fit the facts of a particular case. Use the bracketed material as appropriate.

COMMENT

This instruction is based on Restatement (Second) of Agency Section 220(2) (1958), which Washington courts have adopted as the test for distinguishing between agents and independent contractors. See *Hollingbery v. Dunn*, 68 Wn.2d 75, 80–81, 411 P.2d 431 (1966); *Massey v. Tube Art Display, Inc.*, 15 Wn.App. 782, 786–87, 551 P.2d 1387 (1976); see also *DeWater v. State*, 130 Wn.2d 128, 139–40, 921 P.2d 1059 (1996) (worker hired by foster parent).

The language of WPI 50.11.01 differs slightly from that found in the Restatement (Second) of Agency, which was written for use by lawyers and judges rather than jurors. The WPI Committee removed labels such as “employer,” “workman,” “master,” “servant,” and “principal,” in favor of referring to the appropriate entities by their own

names. WPI 50.11.01 also expands the test in Restatement (Second) of Agency section 220(2) (1958) by explaining to jurors that the factors are of varying weight and that they relate back to the crucial issue of control. Massey, 15 Wn.App. at 787 (“All of [the factors in the Restatement test] are of varying importance in determining the type of relationship involved, and with the exception of control, not all the elements need be present.”). See also Chapman v. Black, 49 Wn.App. 94, 99, 741 P.2d 998 (1987).

Rather than list factors to weigh, the Restatement (Third) of Agency (which has not yet been adopted in a published opinion in Washington) defines what an employee is and focuses on the degree of control the principal exercises over the agent. Restatement (Third) of Agency § 7.07 (2006). According to the Restatement (Third) of Agency, an employee is an agent whose principal controls or has the right to control the manner and means of the agent’s performance of work, and the fact that work is performed gratuitously does not relieve a principal of liability. Restatement (Third) of Agency § 7.07(3) (2006).

It is error to use this instruction to determine whether a person is an employee or independent contractor for purposes of RCW Chapter 49.46, the Washington Minimum Wage Act (MWA). In Anfinson v. FedEx Ground Package System, Inc., 159 Wn.App. 35, 51–53, 244 P.3d 32 (2010), affirmed 174 Wn.2d 851, 281 P.3d 289 (2012), the court referenced WPI 50.11.01, but held that a different test must be used to distinguish between an employee and an independent contractor for purposes of the MWA. The economic realities test is “whether, as a matter of economic reality, the worker is dependent on the alleged employer” rather than “the common-law test of right to control the worker’s performance.” Anfinson, 159 Wn.App. at 53. The court cited with approval a six-factor economic realities test adopted by the Washington Department of Labor and Industries (DLI). Anfinson, 159 Wn.App. at 54.

[Current as of November 2021.]

WPI 50.12

PARTNERSHIP—DEFINITION

A partnership is an association of two or more persons to carry on, as co-owners, a business for profit. The members of a partnership are called partners.

NOTE ON USE

For the scope of this instruction, see WPI 50.00 (Introduction).

Use this instruction only when there is an issue as to the existence of a partnership. Use WPI 50.14 (Act of Partner is Act of All Partners) with this instruction. If the issue is whether the partner was acting within the scope of partnership business, use WPI 50.13 (Partnership—Scope of Partnership Business Defined).

COMMENT

RCW 25.05.005(6).

Whether a partnership exists depends on the intention of the parties, ascertained by examining all of the facts and circumstances, including the parties' actions and conduct. *Douglas v. Jepson*, 88 Wn.App. 342, 347, 945 P.2d 244 (1997).

[Current as of November 2021.]

WPI 50.13

**PARTNERSHIP—SCOPE OF PARTNERSHIP
BUSINESS DEFINED**

A partner is acting within the scope of the partnership business when doing anything that is either expressly or impliedly authorized by the partnership or that is in furtherance of the partnership business.

NOTE ON USE

For the scope of this instruction, see WPI 50.00 (Introduction).

Use this instruction when there is an issue whether a partner's act was within the scope of the partnership business. Use WPI 50.14 (Act of Partner is Act of All Partners) with this instruction. If the existence of the partnership is in dispute, use WPI 50.12 (Partnership—Definition) with the instruction.

COMMENT

A partnership is bound by a partner's wrongful acts. RCW 25.05.100(1). A partner is an agent of the partnership. RCW 25.05.100(1).

Liability of one partner for acts of co-partners is founded upon principles of agency. *Mading v. McPhaden*, 50 Wn.2d 48, 55, 308 P.2d 963 (1957); *Melosevich v. Cichy*, 30 Wn.2d 702, 712-13, 193 P.2d 342 (1948); *Poutre v. Saunders*, 19 Wn.2d 561, 565-66, 143 P.2d 554 (1943).

The test of liability of co-partners for a tort committed by a member of a partnership is whether the wrong committed was within the scope of the partnership. RCW 25.05.120(1); *Iron v. Sauve*, 27 Wn.2d 562, 179 P.2d 327 (1947) (when negligence of a partner has been imputed to the partnership, the negligent partner was either in the immediate performance of partnership activities, or was using an instrumentality owned by the partnership, or using an instrumentality with the express or implied authority of the co-partners).

[Current as of November 2021.]

WPI 50.14

ACT OF PARTNER IS ACT OF ALL PARTNERS

An act or omission of a partner within the scope of the partnership business is the act or omission of all partners.

NOTE ON USE

For the scope of this instruction, see WPI 50.00 (Introduction).

Use WPI 50.12 (Partnership—Definition) or WPI 50.13 (Partnership—Scope of Partnership Business Defined), or both of them, with this instruction depending upon the questions in issue.

COMMENT

See Comment to WPI 50.13 (Partnership—Scope of Partnership Business Defined). In *Dixon v. Haynes*, 146 Wash. 163, 171–72, 262 P. 119 (1927), the court held that a partnership is liable for the tort of a partner committed in the scope of the partnership business.

A partnership is liable for torts committed by a partner outside the scope of the partnership business if the act was authorized by the other partners. RCW 25.05.100(2). Additionally, a partnership is liable for acts of a “purported partner” having apparent authority to act on behalf of the partnership. RCW 25.05.135(2); see also WPI 50.02.01 (Agent—Scope of Apparent Authority Defined).

Partnership law generally applies to joint ventures, so that the act of one co-venturer may bind the co-venture partnership. *Pietz v. Indermuehle*, 89 Wn.App. 503, 509–10, 949 P.2d 449 (1998).

[Current as of November 2021.]

WPI 50.18

**CORPORATION ACTS THROUGH ITS
EMPLOYEES—NO ISSUE AS TO SCOPE OF
AGENCY**

(Name of corporation) is a corporation. A corporation can act only through its officers and employees. Any act or omission of an officer or employee is the act or omission of the corporation.

NOTE ON USE

For the scope of this instruction, see WPI 50.00 (Introduction).

Use this instruction only when there is no issue as to agency or scope of employment. Modify the instruction accordingly if more than one party is a corporation.

COMMENT

A corporation can act only through its agents, and when its agents act within the scope of their actual or apparent authority, their actions are the actions of the corporation itself. *Am. Seamount Corp. v. Sci. & Eng'g Assocs., Inc.*, 61 Wn.App. 793, 796–97, 812 P.2d 505 (1991); *Mauch v. Kissling*, 56 Wn.App. 312, 316, 783 P.2d 601 (1989).

Corporate liability also extends to the agents' unauthorized acts whenever the corporation is deemed to have ratified those acts. See *In re Spokane Concrete Prods., Inc.*, 126 Wn.2d 269, 277–78, 892 P.2d 98 (1995) (corporation that retained benefit is estopped from ultra vires defense).

If an issue exists as to agency or scope of employment, then this instruction will have to be modified. The instruction may be modified by incorporating language from instructions elsewhere in this chapter addressing liability when agency or scope of employment is denied. See, e.g., WPI 50.06 (Both Principal and Agent Sued—Agency or Authority Denied), WPI 50.07 (Principal Sued But Not Agent—Agency or Authority Denied), and WPI 50.16 (Partnership—Existence Admitted—Scope of Partnership Business in Issue—Effect).

[Current as of November 2021.]

WPI 50.20

ACTING IN CONCERT—RCW 4.22.070—DEFINITION

Two or more people act in concert if they consciously act together in an unlawful manner. It is not necessary that they intend to harm the plaintiff.

NOTE ON USE

Use this instruction if there is an issue under RCW 4.22.070(1)(a) whether a defendant was acting in concert with another party or person.

Use this instruction with WPI 50.21 (Acting in Concert—RCW 4.22.070—Liability).

COMMENT

RCW 4.22.070(1)(a).

Background. The statute provides in part that the liability of multiple defendants shall be several only, except that a “party shall be responsible for the fault of another person or for payment of the proportionate share of another party where both were acting in concert or when a person was acting as an agent or servant of the party.”

Although RCW 4.22.070 does not define “acting in concert,” the Washington Supreme Court held that the Legislature intended the term to require two or more people consciously acting together in an unlawful manner. *Kottler v. State*, 136 Wn.2d 437, 448–49, 963 P.2d 834 (1998) (incorporating the analysis in *Gilbert H. Moen Co. v. Island Steel Erectors, Inc.*, 75 Wn.App. 480, 487, 878 P.2d 1246 (1994), reversed on other grounds, 128 Wn.2d 745, 762 n.8, 912 P.2d 472 (1996)).

This narrow definition replaces the broader definition that the common law had gradually developed prior to the passage of the Tort Reform Act. *Gilbert H. Moen Co.*, 75 Wn.App. at 486–88. However, the narrow definition adopted in *Kottler* does not necessarily apply to all claims of concerted action arising under the common law. See *Martin v. Abbott Lab’ys*, 102 Wn.2d 581, 596–99, 689 P.2d 368 (1984) (generally discussing the common law theory of concerted action).

The narrow definition excludes mere concurrent tortfeasors by requiring that the actors consciously combined their actions; it excludes mere co-conspirators by requiring that each of the actors actively

participated in the unlawful conduct. See *Gilbert H. Moen Co.*, 75 Wn.App. at 486.

Although all tortfeasors must actively engage in the conduct, there is no requirement that they intend to harm the plaintiff. *Gilbert H. Moen Co.*, 75 Wn.App. at 487; *Yong Tao v. Heng Bin Li*, 140 Wn.App. 825, 832, 166 P.3d 1263 (2007).

Terms not yet defined. The courts have not yet defined the key terms “consciously” and “unlawful manner” in the context of this instruction. The only guidance for practitioners is the court’s comment in *Gilbert H. Moen Co.* that the word “consciously” is not limited to intentional conduct:

Moen objects that [the narrow definition] would restrict acting in concert to intentional torts, which are already not included in proportional fault. This is not an accurate [analysis of the narrow definition]. Action in concert requires only that the actors consciously act together in an unlawful manner. It does not require that they intend to harm the plaintiff. Sisk cites “highway drag-racing in which an innocent bystander is injured” as an example.

Gilbert H. Moen Co., 75 Wn.App. at 487 (quoting Sisk, *Interpretation of the Statutory Modification of Joint and Several Liability: Resisting the Deconstruction of Tort Reform*, 16 U.Puget Sound L.Rev. 1, 108 (1992)).

For additional discussion of “acting in concert,” see DeWolf & Allen, 16 Washington Practice, Tort Law & Practice § 13.11 (5th ed.).

[Current as of November 2021.]

PART VII

STATUTORY VIOLATIONS

CHAPTER 60

STATUTORY VIOLATIONS

- WPI 60.01.01 Violation of Statute, Ordinance, or Administrative Rule—Negligence Per Se
- WPI 60.03 Violation of Statute, Ordinance, Administrative Rule, or Internal Governmental Policy—Evidence of Negligence
- WPI 60.04 Standard of Conduct for Child—Violation of Statute, Ordinance, or Administrative Rule

WPI 60.01.01

VIOLATION OF STATUTE, ORDINANCE, OR ADMINISTRATIVE RULE—NEGLIGENCE PER SE

The violation, if you find any, of a [statute] [ordinance] [administrative rule] relating to

[electrical fire safety]

[the use of smoke alarms]

[sterilization of needles and instruments used in the practice of [body art] [body piercing] [tattooing] [or] [electrology] [or other precaution against the spread of disease]]

[driving while under the influence of alcohol or any drug]

is negligence as a matter of law. Such negligence has the same effect as any other act of negligence.

[While such a violation is, generally speaking, negligence as a matter of law, it is not negligence if it is due to some cause beyond the violator's control that ordinary care could not have guarded against.]

NOTE ON USE

Use this instruction if the statute, ordinance, or administrative rule violated relates to one of the subject areas for which negligence per se applies under RCW 5.40.050: electrical fire safety, the use of smoke alarms, sterilization of needles or instruments used in the practice of body art, body piercing, tattooing, or electrology (or other precaution against the spread of disease), or driving while under the influence. For other violations, use WPI 60.03 (Violation of Statute, Ordinance, Administrative Rule, or Internal Governmental Policy—Evidence of Negligence).

This instruction should be given immediately following the enactment or enactments to which it refers. To instruct the jury about the provisions of a particular enactment, see WPI 60.01 (Statute, Ordinance, or Administrative Rule).

If a child has violated a statute, ordinance or administrative rule, see WPI 60.04 (Standard of Conduct for Child—Violation of Statute, Ordinance, or Administrative Rule).

Use the bracketed material as applicable.

COMMENT

RCW 5.40.050. The statute sets forth the general rule that violations of law may be evidence of negligence but do not constitute negligence per se. See WPI 60.03 (Violation of Statute, Ordinance, Administrative Rule, or Internal Governmental Policy—Evidence of Negligence).

As an exception to that general rule, the statute provides in part:

[A]ny breach of duty as provided by statute, ordinance or administrative rule relating to (1) electrical fire safety, (2) the use of smoke alarms, (3) sterilization of needles and instruments used by persons engaged in the practice of body art, body piercing, tattooing, or electrology, or other precaution against the spread of disease, as required under RCW 70.54.350, or (4) driving while under the influence of intoxicating liquor or any drug, shall be considered negligence per se.

RCW 5.40.050.

In *Chester v. Deep Roots Alderwood, LLC*, 193 Wn.App. 147, 371 P.3d 113 (2016), the court held that absent any statute or regulation that created a duty for tattoo artists to use sterile ink, a tattoo artist, who allegedly used ink that appeared to have been contaminated while being manufactured, was not negligent per se for the plaintiff's adverse reaction to the ink.

To be consistent with other instructions the WPI Committee chose to use the phrase "violation of" rather than the phrase "breach of a duty imposed by" employed in RCW 5.40.050.

By restricting its use to enactments relating to specific subjects, RCW 5.40.050 significantly limits the doctrine of negligence per se. Prior to August 1, 1986, Washington followed the rule that the violation of any statute, ordinance, or administrative rule having the force of law constituted negligence per se.

Not every violation of an enactment or administrative rule relating to electrical fire safety, smoke alarms, improper sterilization of needles (and related activities), or driving while under the influence will constitute negligence per se. As a matter of law, the statute, ordinance, or administrative rule violated must still meet the test set forth in Restatement (Second) of Torts section 286 (1965), before the jury may be instructed concerning negligence per se. See the discussion in the Comment to WPI 60.03 (Violation of Statute, Ordinance, Administrative Rule, or Internal Governmental Policy—Evidence of Negligence).

Although the violation of certain statutes, ordinances, or administrative rules may be negligence per se, it does not follow that compliance always constitutes ordinary care. The statutory standard is only a minimum standard, and does not necessarily preclude a finding of negligence for failure to take additional precautions. See *Robison v. Simard*, 57 Wn.2d 850, 852, 360 P.2d 153 (1961).

RCW 5.40.050 does not mention justification or excuse as a basis to avoid the imposition of the doctrine. However, cases decided prior to the enactment of the 1986 law are clear that justification or excuse may be asserted by the violator. See *Wood v. Chi., M., St.P. & Pac. R.R. Co.*, 45 Wn.2d 601, 277 P.2d 345 (1954); *Bissell v. Seattle Vancouver Motor Freight, Ltd.*, 25 Wn.2d 68, 168 P.2d 390 (1946).

[Current as of February 2021.]

WPI 60.03**VIOLATION OF STATUTE, ORDINANCE,
ADMINISTRATIVE RULE, OR INTERNAL
GOVERNMENTAL POLICY—EVIDENCE OF
NEGLECT**

The violation, if any, of a [statute] [ordinance] [administrative rule] [internal governmental policy] is not necessarily negligence, but may be considered by you as evidence in determining negligence.

[Such a violation may be excused if it is due to some cause beyond the violator's control, and that ordinary care could not have guarded against.]

NOTE ON USE

Use this instruction if the statute, ordinance, or administrative rule violated does not relate to electrical fire safety, the use of smoke alarms, sterilization of needles (and related activities), or driving while under the influence. For such violations, use WPI 60.01.01 (Violation of Statute, Ordinance, or Administrative Rule—Negligence Per Se).

If a child has violated a statute, ordinance or administrative rule, see WPI 60.04 (Standard of Conduct for Child—Violation of Statute, Ordinance, or Administrative Rule).

Use bracketed material as applicable.

COMMENT

Effect of RCW 5.40.050. RCW 5.40.050 provides, in part: "A breach of a duty imposed by statute, ordinance, or administrative rule shall not be considered negligence per se, but may be considered by the trier of fact as evidence of negligence . . ." To be consistent with other instructions, the WPI Committee chose to use the phrase "violation of" rather than the phrase "breach of duty imposed by" used in RCW 5.40.050.

In order for a statute, ordinance, or administrative rule to be admissible on the issue of negligence, the enactment must satisfy the test set forth in Restatement (Second) of Torts section 286 (1965). See *Schooley v. Pinch's Deli Mkt., Inc.*, 134 Wn.2d 468, 474–75, 951 P.2d 749 (1998). Pursuant to section 286, the purpose of the legislative enactment or

administrative regulation must be found by the trial court exclusively or in part:

- (a) to protect a class of persons which includes the one whose interest is invaded, and
- (b) to protect the particular interest which is invaded, and
- (c) to protect that interest against the kind of harm which has resulted, and
- (d) to protect that interest against the particular hazard from which the harm results.

Restatement (Second) of Torts § 286 (1965).

In *Estate of Kelly v. Falin*, 127 Wn.2d 31, 896 P.2d 1245 (1995), the court held that a violation of a criminal statute constitutes evidence of negligence only if the statute was intended to protect both the person bringing the action and the particular interest involved.

The violation of a statute, ordinance, or administrative rule is actionable only if it was a proximate cause of the accident or injury in question. *Ward v. Zeugner*, 64 Wn.2d 570, 392 P.2d 811 (1964). If there is a prima facie causal connection and if the requirements of Restatement (Second) of Torts section 286 (1965) are met, the proximate cause question is for the jury. *Kness v. Truck Trailer Equip., Co.*, 81 Wn.2d 251, 501 P.2d 285 (1972).

Regarding the bracketed sentence, see the Comment to WPI 60.01.01 (Violation of Statute, Ordinance, or Administrative Rule—Negligence Per Se).

In *Hansen v. Friend*, 118 Wn.2d 476, 824 P.2d 483 (1992), a case filed after the effective date of the 1986 Tort Reform Act, the court held that RCW 66.44.270(1), which makes it a criminal act for any person to furnish liquor to a minor, also imposes a duty of care on social hosts not to serve liquor to minors. The court, citing RCW 5.40.050, stated that if a social host breaches his or her duty not to furnish liquor to a minor, the trier of fact may consider the breach as evidence of negligence, rather than negligence per se. The *Hansen* court cited WPI 60.03 with approval for the proposition that a statutory violation is not negligence if the violation is due to some cause beyond the violator's control, and ordinary care could not have guarded against the violation. *Hansen*, 118 Wn.2d at 483.

It may be reversible error not to instruct on a statutory violation.

In *Trueax v. Ernst Home Center, Inc.*, 70 Wn.App. 381, 853 P.2d 491 (1993), the court held that it was reversible error not to give a proposed instruction that all signs must have vertical clearance above the sidewalk grade of at least ten feet because the proposed instruction correctly stated the law under the applicable city ordinance. The court noted that while violation of the ordinance was not negligence per se, it was evidence of negligence under RCW 5.40.050, and the failure to give the proposed instruction did not allow the plaintiff to argue her theory of the case to the jury.

The Washington Supreme Court ultimately reversed the Court of Appeals in *Trueax* on the technical grounds that trial counsel's objection had not cited the correct applicable statute. *Trueax v. Ernst Home Ctr., Inc.*, 124 Wn.2d 334, 878 P.2d 1208 (1994); see also *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 96 P.3d 386 (2004) (reversible error not to instruct on RCW 66.44.200—the commercial host statute—in a case in which the plaintiff was injured by allegedly over-served driver, as persons injured by intoxicated drivers are within the class of persons the statute was designed to protect). But see *Quynn v. Bellevue Sch. Dist.*, 195 Wn.App. 627, 383 P.3d 1053 (2016) (administrative definition of harassment included in the statute applicable to school districts did not apply when that claim was pled in common law; the instruction based on RCW 28A.300.285(1),(2) was in error).

A court cannot find negligence as a matter of law merely because a statutory duty was violated without justification or excuse; rather, the court must determine whether, in light of all the evidence, reasonable minds could differ on whether the defendant used ordinary care. *Mathis v. Ammons*, 84 Wn.App. 411, 928 P.2d 431 (1996).

In *Yurkovich v. Rose*, 68 Wn.App. 643, 653, 847 P.2d 925 (1993), the trial court directed a verdict of negligence against the defendant, reserving causation for the jury. Finding no abuse of discretion, the appellate court stated:

We do not interpret RCW 5.40.050 as meaning that a trial court cannot under any circumstances find negligence as a matter of law where the violations of statutes, ordinances, or administrative rules are involved. The statute eliminates evidence of a violation alone being used to support a finding of negligence per se. It permits a defendant to explain the circumstances and show excuse or justification for the apparent violation.

Yurkovich, 68 Wn.App at 653.

Violation of internal governmental policy. In *Joyce v. Depart-*

ment of Corrections, 155 Wn.2d 306, 119 P.3d 825 (2005), the Supreme Court concluded that the trial court properly admitted an internal governmental policy directive concerning the supervision of defendants by the Department of Corrections as evidence of negligence under the prior statute. However, failure to give an instruction similar to WPI 60.03 was reversible error as the internal policy directive was merely evidence of negligence and not conclusive evidence of negligence. Joyce, 155 Wn.2d at 324.

Violation of private industry standards. Standards adopted by private parties or trade associations may be admissible on the issue of negligence when shown to be reliable and relevant, but are not conclusive evidence of negligence. See *Andrews v. Burke*, 55 Wn.App. 622, 779 P.2d 740 (1989) (violation of a hospital regulation does not amount to negligence per se).

In a case involving private industry standards, practitioners will need to consider whether the pattern instruction should be used with appropriate modifications. Jurors may be less likely to be misled into thinking that violation of a private industry standard is per se negligence than they are in cases involving governmental standards. Care should be taken to avoid a judicial comment on the evidence when using this instruction for private industry standards.

[Current as of February 2021.]

WPI 60.04**STANDARD OF CONDUCT FOR CHILD—
VIOLATION OF STATUTE, ORDINANCE, OR
ADMINISTRATIVE RULE**

The violation of a [statute] [ordinance] [administrative rule] by a child may be considered as evidence of negligence only if you find that a reasonable child of the same age, intelligence, maturity, training, and experience as the child in question would not have acted in violation of the [statute] [ordinance] [administrative rule] under the same or similar circumstances.

NOTE ON USE

Use this instruction with WPI 60.03 (Violation of Statute, Ordinance, Administrative Rule, or Internal Governmental Policy—Evidence of Negligence) when the violation of a statute, ordinance, or administrative rule by a child is introduced as evidence of the child's negligence or contributory negligence.

Use WPI 10.05 (Ordinary Care—Child—Definition) with this instruction.

Use bracketed material as applicable.

COMMENT

If a violation of a statute or ordinance is used as evidence of a child's negligence, the jury must first be instructed as to the standard of care that applies to children, and then be instructed that the violation may be considered as evidence of negligence only if the jury finds that a reasonable child of the same age, intelligence, maturity, training, and experience would not have violated the statute, ordinance, or regulation under the same circumstances. *Bauman v. Crawford*, 104 Wn.2d 241, 244, 247–48, 704 P.2d 1181 (1985).

[Current as of February 2021.]

PART VIII

MOTOR VEHICLES

CHAPTER 70

MOTOR VEHICLES

WPI 70.01	General Duty—Driver or Pedestrian
WPI 70.02	Right of Way—Uncontrolled Intersection
WPI 70.02.01	Right of Way—Left Turn
WPI 70.02.02	Right of Way—Stop Sign
WPI 70.02.03	Right of Way—Yield Sign
WPI 70.02.04	Right of Way—Emerging From Alley, Driveway, or Building in Business or Residence District
WPI 70.02.05	Right of Way—Entering Street or Highway From Private Road or Driveway
WPI 70.02.06	Right of Way—Deception Doctrine
WPI 70.03	Right of Way of a Pedestrian Within a Crosswalk
WPI 70.03.02	Driver Approaching a Crosswalk—Duty to Stop
WPI 70.03.03	Duty of a Pedestrian Before Entering a Crosswalk
WPI 70.03.04	Pedestrian Crossing a Roadway Outside of a Crosswalk
WPI 70.03.05	Crosswalk—Definition
WPI 70.04	Duty of Following Driver
WPI 70.05	Speed
WPI 70.06	Right to Assume Others Will Obey Law—Streets or Highways
WPI 70.08	Use of Safety Belts
WPI 70.09	Bicyclists—Statutory Rights and Duties

WPI 70.01

GENERAL DUTY—DRIVER OR PEDESTRIAN

It is the duty of every person using a public street or highway [whether a pedestrian or a driver of a vehicle] to exercise ordinary care to avoid placing [himself or herself or] others in danger and to exercise ordinary care to avoid a collision.

NOTE ON USE

This instruction defines the common law duty of persons on public streets, roads, and highways. It is to be used, if appropriate, along with those instructions that define more specific duties. It should be followed by an instruction defining ordinary care, either WPI 10.02 (Ordinary Care—Adult—Definition) or WPI 10.05 (Ordinary Care—Child—Definition).

Use the first bracketed phrase if the instruction is intended to be applied to a pedestrian. Use the bracketed phrase “himself or herself or” if there is an issue of contributory negligence properly in the case. If there is no issue of contributory negligence being submitted to the jury, omit both bracketed phrases.

COMMENT

Both drivers and pedestrians must exercise a degree of care that a reasonably prudent person would have exercised under the same or similar circumstances even though they may have the right of way or be the “favored” driver. *Robison v. Simard*, 57 Wn.2d 850, 360 P.2d 153 (1961); *Hanson v. Anderson*, 53 Wn.2d 601, 335 P.2d 581 (1959). The degree of care does not vary although different weather or traffic conditions may require a greater amount of care. *Ulve v. Raymond*, 51 Wn.2d 241, 317 P.2d 908 (1957).

RCW 70.84.040 provides an enhanced duty of care for certain pedestrians with a disability. In such circumstances, do not use this instruction. See RCW 70.84.040; *Wright v. Engum*, 124 Wn.2d 343, 878 P.2d 1198 (1994).

[Current as of February 2021.]

WPI 70.02

RIGHT OF WAY—UNCONTROLLED INTERSECTION

A statute provides that when two vehicles approach or enter an intersection from different streets or roadways at approximately the same time, the driver of the vehicle on the left shall yield the right of way to the vehicle on the right. This right of way, however, is not absolute but relative, and the duty to exercise ordinary care to avoid collisions at intersections rests upon both drivers. The primary duty, however, rests upon the driver on the left, which duty must be performed with reasonable regard to the maintenance of a fair margin of safety at all times.

NOTE ON USE

Use this instruction in cases involving uncontrolled intersections. Use WPI 60.03 (Violation of Statute, Ordinance, Administrative Rule, or Internal Governmental Policy—Evidence of Negligence) with this instruction.

COMMENT

RCW 46.61.180(1). The statute applies when two vehicles approach or enter the intersection from different highways at approximately the same time.

RCW 46.61.180 was amended in 2019 to add additional sections stipulating enhanced penalties in some circumstances for a traffic infraction arising out of the conduct now included, without change, within subsection (1). Laws 2019, Chapter 403, § 5. There is no proposed change to the instruction.

If a collision occurs within an intersection, the statute applies as a matter of law. *Chavers v. Ohad*, 59 Wn.2d 646, 369 P.2d 831 (1962); *Zorich v. Billingsley*, 52 Wn.2d 138, 324 P.2d 255 (1958), superseded on other grounds, *Cox v. Gen. Motors*, 64 Wn.App. 823, 827 P.2d 1052 (1992) (discussing earlier version of the statute). Even if the actual collision occurred outside the bounds of the intersection, the driver on the left is liable if he or she failed to yield the right of way with reasonable regard to maintaining a fair margin of safety. *Tobias v. Rainwater*, 71 Wn.2d 845, 431 P.2d 156 (1967); accord *Axness v. Edwards*, 9 Wn.App. 780, 515 P.2d 174 (1973).

The favored driver is entitled to rely on the disfavored driver's yielding the right of way at an uncontrolled intersection until the favored driver reaches that point at which a reasonable person exercising reasonable care would realize that the disfavored driver is not going to yield. *Whitchurch v. McBride*, 63 Wn.App. 272, 275-76, 818 P.2d 622 (1991); *Maxwell v. Piper*, 92 Wn.App. 471, 476, 963 P.2d 941 (1998).

[Current as of February 2021.]

WPI 70.02.01

RIGHT OF WAY—LEFT TURN

A statute provides that a driver intending to turn to the left within an intersection [or into an alley] [or into a private road] [or into a driveway] shall yield the right of way to any vehicle approaching from the opposite direction that is within the intersection or so close thereto as to constitute an immediate hazard. This right of way, however, is not absolute but relative, and the duty to exercise ordinary care to avoid collisions at intersections rests upon both drivers. The primary duty, however, rests upon the driver turning to the left, which duty must be performed with reasonable regard to the maintenance of a fair margin of safety at all times.

NOTE ON USE

Use this instruction in cases involving left turns. In an intersection case, omit the bracketed phrases. If the case involves an alley, private road, or driveway, use the appropriate bracketed phrase.

Use WPI 60.03 (Violation of Statute, Ordinance, Administrative Rule, or Internal Governmental Policy—Evidence of Negligence) with this instruction.

COMMENT

RCW 46.61.185(1). RCW 46.61.185 was amended in 2019 to add additional sections stipulating enhanced penalties in some circumstances for a traffic infraction arising out of the conduct now included, without change, within subsection (1). Laws of 2019, Chapter 403, § 6. There is no proposed change to the instruction.

The right of way rule for left turns at intersections is the same as the rule for uncontrolled intersections. *Key v. Reiswig*, 55 Wn.2d 512, 348 P.2d 410 (1960) (approving a prior version of this instruction).

A driver making a left-hand turn must yield to oncoming traffic even if the oncoming vehicle was proceeding unlawfully. *Doherty v. Mun. of Metro. Seattle*, 83 Wn.App. 464, 470, 921 P.2d 1098 (1996); *Mossman v. Rowley*, 154 Wn.App. 735, 741, 229 P.3d 812 (2009).

See the Comment to WPI 70.02.06 (Right of Way—Deception Doctrine) for additional discussion of left turn cases.

[Current as of February 2021.]

WPI 70.02.02

RIGHT OF WAY—STOP SIGN

A statute provides that [except when directed to proceed by a duly authorized flagger, or a police officer, or a firefighter vested by law with authority to direct, control, or regulate traffic] every driver approaching a stop sign shall stop [[at a clearly marked stop line] [,] [but if none,] [before entering a marked crosswalk on the near side of the intersection] [or,] [if none] [then at the point nearest the intersecting roadway where the driver has a view of approaching traffic on the intersecting roadway before entering the roadway]]. After having stopped, the driver shall yield the right of way to any vehicle in the intersection or approaching on another roadway so closely as to constitute an immediate hazard during the time the driver who had the duty to stop is moving across or within the intersection or junction of roadways.

This right of way, however, is not absolute but relative, and the duty to exercise ordinary care to avoid collisions at intersections rests upon both drivers. The primary duty, however, rests upon the driver who faces a stop sign, which duty must be performed with reasonable regard to the maintenance of a fair margin of safety at all times.

NOTE ON USE

Use this instruction in cases involving intersections where one vehicle is controlled by a stop sign and the other is not. Use bracketed material as applicable.

Use WPI 60.03 (Violation of Statute, Ordinance, Administrative Rule, or Internal Governmental Policy—Evidence of Negligence) with this instruction.

Use bracketed phrases in the first paragraph of the instruction if appropriate under the facts.

COMMENT

The instruction has been modified for this edition to more closely follow RCW 46.61.190(1).

RCW 46.61.190(1) and (2). RCW 46.61.190(1) was amended in 2019 to create an exception to the duty to stop when directed to proceed by a duly authorized flagger, or a police officer, or a firefighter vested by law with authority to direct, control, or regulate traffic.

Duties of drivers in connection with stop signs on the state highway system are set out in RCW 47.36.110, as amended effective October 1, 2020. Laws of 2020, Chapter 66, § 5.

A driver on an arterial protected by a stop sign has the right of way, but must still exercise ordinary care. *Sanchez v. Haddix*, 95 Wn.2d 593, 597, 627 P.2d 1312 (1981). In *Dunn v. Harmon*, 5 Wn.App. 87, 92, 486 P.2d 103 (1971), the trial court instructed on the rights and duties of the favored driver but did not instruct on the duties of the disfavored driver. In reversing the trial court on this issue, the Court of Appeals approved language the same as the first paragraph of this instruction.

[Current as of February 2021.]

WPI 70.02.03

RIGHT OF WAY—YIELD SIGN

A statute provides that a driver approaching a yield sign shall slow down [to a speed reasonable for existing conditions,] and if required for safety to stop, shall stop [at a clearly marked stop line] [before entering a marked crosswalk on the near side of the intersection] [at the point nearest the intersecting roadway where the driver has a view of approaching traffic on the intersecting roadway before entering the roadway] and then after slowing or stopping, the driver shall yield the right of way to any vehicle in the intersection or approaching on another roadway so closely as to constitute an immediate hazard during the time the driver who has the duty to yield is moving across or within the intersection or junction of roadways.

This right of way, however, is not absolute but relative and the duty to exercise ordinary care to avoid collisions at intersections rests upon both drivers. The primary duty, however, rests upon the driver who faces a yield sign, which duty must be performed with reasonable regard to the maintenance of a fair margin of safety at all times.

[If a driver approaching a yield sign is involved in a collision with a vehicle in the intersection, after driving past a yield sign without stopping, the collision gives rise to a presumption of failure to yield right of way. This presumption is not binding upon you and it is for you to determine what weight, if any, the presumption is to be given.]

NOTE ON USE

Use this instruction when a yield sign is involved. Use bracketed material as applicable. Use the bracketed paragraph on the statutory presumption only if the evidence warrants it.

Use WPI 60.03 (Violation of Statute, Ordinance, Administrative

Rule, or Internal Governmental Policy—Evidence of Negligence) with this instruction.

COMMENT

RCW 46.61.190(3). This instruction has been modified for this edition to more closely follow the statute.

RCW 46.61.190(3). RCW 46.61.190 was amended in 2019 to add additional sections stipulating enhanced penalties in some circumstances for a traffic infraction arising out of the conduct of failing to yield sign, now included, without change, within subsections (1) and (3). Laws of 2019, Chapter 403, § 7; Laws of 2020, Chapter 66, § 2.

Duties of drivers in connection with yield signs on the state highway system are set out in RCW 47.36.110, as amended effective October 1, 2020. Laws of 2020, Chapter 66, § 5.

The statute provides that a collision after failure to stop is prima facie evidence of failure to yield right of way. There is no statutory definition of prima facie evidence. This instruction substitutes the word presumption for prima facie. Criminal case law treats prima facie as equivalent to a presumption that is not binding on the jury. *State v. Person*, 56 Wn.2d 283, 352 P.2d 189 (1960), overruled on other grounds by *State v. Rogers*, 83 Wn.2d 553, 520 P.2d 159 (1974); *City of Olympia v. Sprout*, 5 Wn.App. 897, 492 P.2d 586 (1971).

[Current as of February 2021.]

WPI 70.02.04**RIGHT OF WAY—EMERGING FROM ALLEY,
DRIVEWAY, OR BUILDING IN BUSINESS OR
RESIDENCE DISTRICT**

A statute provides that a driver who is emerging from [an alley] [a driveway] [a building] shall stop the vehicle immediately before driving onto a sidewalk or onto the sidewalk area extending across the [alley] [driveway] [and shall yield the right of way to any [[pedestrian] [personal delivery device]] as may be necessary to avoid collision] [and upon entering the roadway shall yield the right of way to all vehicles approaching on the roadway].

This right of way, however, is not absolute but relative, and the duty to exercise ordinary care rests upon both parties. The primary duty, however, rests upon the driver of the emerging vehicle, which duty must be performed with reasonable regard to the maintenance of a fair margin of safety at all times.

NOTE ON USE

Use this instruction when a vehicle is emerging from an alley, driveway, or building within a business or residence district. Use WPI 70.02.05 (Right Of Way—Entering Street or Highway From Private Road or Driveway) if the area is outside of a business or residence district. Use bracketed material as applicable.

Use WPI 60.03 (Violation of Statute, Ordinance, Administrative Rule, or Internal Governmental Policy—Evidence of Negligence) with this instruction.

A definition of personal delivery device may be crafted if it will be helpful for the jury. See Comment below.

COMMENT

RCW 46.61.365. The statute was amended in 2019 to add a “personal delivery device” as a protected entity. Laws of 2019, Chapter 214, § 18. The instruction has been modified to reflect this change.

A personal delivery device is defined at RCW 46.61.733, incorporating the definition within RCW 46.75.010(4):

(4) “Personal delivery device” means an electrically powered device to which all of the following apply:

- (a) The device is intended primarily to transport property on sidewalks and crosswalks;
- (b) The device weighs less than one hundred twenty pounds, excluding any property being carried in the device;
- (c) The device will operate at a maximum speed of six miles per hour; and
- (d) The device is equipped with automated driving technology, including software and hardware, enabling the operation of the device, with the support and supervision of a remote personal delivery device operator.

If the issue is a jury question under the evidence, or if the definition will help the jury, the appropriate statutory definition can be given and this instruction should be modified.

The issue of whether the street or highway is in a business or residence district will usually be decided by the court as a matter of law. RCW 46.04.080 defines a business district. RCW 46.04.470 defines a residence district. If the issue is a jury question under the evidence, the appropriate statutory definition can be given and this instruction should be modified.

WPI 70.02.04 was approved in *Wood v. City of Bellingham*, 62 Wn.App. 61, 813 P.2d 142 (1991) (a pedestrian who walks in front of a vehicle pulling out of parking lot knowing that the driver has not seen her is contributorily negligent). *Sulkosky v. Brisebois*, 49 Wn.App. 273, 742 P.2d 193 (1987) (a pedestrian not yielding to a backing vehicle may be negligent).

[Current as of February 2021.]

WPI 70.02.05

**RIGHT OF WAY—ENTERING STREET OR HIGHWAY
FROM PRIVATE ROAD OR DRIVEWAY**

A statute provides that a driver about to enter or cross a public street or highway from a private road or driveway shall yield the right of way to all vehicles approaching on the public street or highway.

This right of way, however, is not absolute but relative, and the duty to exercise ordinary care rests upon both parties. The primary duty, however, rests upon the driver of the entering or crossing vehicle, which duty must be performed with reasonable regard to the maintenance of a fair margin of safety at all times.

NOTE ON USE

Use this instruction when a vehicle is emerging from a private road or driveway outside of a business or residence district. Use WPI 70.02.04 (Right of Way—Emerging From Alley, Driveway, or Building in Business or Residence District) if the area is within a business or residence district.

Use WPI 60.03 (Violation of Statute, Ordinance, Administrative Rule, or Internal Governmental Policy—Evidence of Negligence) with this instruction.

COMMENT

RCW 46.61.205(1). RCW 46.61.205 was amended in 2019 to add additional sections stipulating enhanced penalties in some circumstances for a traffic infraction arising out of the conduct now included, without change, within subsection (1). Laws of 2019, Chapter 403, § 8. There is no proposed change to the instruction.

[Current as of February 2021.]

WPI 70.02.06

RIGHT OF WAY—DECEPTION DOCTRINE

The right of way statute in Instruction _____ does not apply if:

- (1) the driver who had the right of way wrongfully, negligently, or unlawfully [operated his or her vehicle] [acted] in a manner that would deceive a reasonably careful driver who did not have the right of way so as to cause that driver to proceed on the assumption that there was a fair margin of safety; and
- (2) the driver who did not have the right of way was in fact so deceived.

NOTE ON USE

Use this instruction with WPI 70.02 (Right of Way—Uncontrolled Intersection), WPI 70.02.01 (Right of Way—Left Turn), WPI 70.02.02 (Right of Way—Stop Sign), WPI 70.02.03 (Right of Way—Yield Sign), WPI 70.02.04 (Right of Way—Emerging from Alley, Driveway, or Building in Business or Residence District), or WPI 70.02.05 (Right of Way—Entering Street or Highway from Private Road or Driveway), only if the evidence in the case warrants it.

This instruction may need modification in order to fit the specific right of way and the specific fact pattern. If under the facts of the case, it is alleged that a pedestrian who had the right of way deceived the disfavored driver into proceeding, the language of this instruction should be modified accordingly.

The second paragraph of WPI 60.03 (Violation of Statute, Ordinance, Administrative Rule, or Internal Governmental Policy—Evidence of Negligence), addressing when a violation of law is excused, should be used with this instruction.

COMMENT

The deception doctrine has limited applicability. Because of this, the instruction should be given “only when the deception is tantamount to an entrapment.” *Oliver v. Harvey*, 31 Wn.App. 279, 283, 640 P.2d

1087 (1982). The doctrine applies “when the disfavored driver sees the favored vehicle and is deceived by the actions of the driver of that vehicle . . . One cannot be deceived by that which he does not see . . .” Oliver, 31 Wn.App. at 283 (quoting Tobias v. Rainwater, 71 Wn.2d 845, 853, 431 P.2d 156 (1967)). A disfavored driver may also be deceived by a clear stretch of road. Oliver, 31 Wn.App. at 284.

For cases in which the deception doctrine was held to apply, see Oliver, 31 Wn.App. 279; Mendelsohn v. Anderson, 26 Wn.App. 933, 614 P.2d 693 (1980); Axness v. Edwards, 9 Wn.App. 780, 515 P.3d 174 (1980).

For cases in which the deception doctrine was held not to apply, see Kerlik v. Jerke, 56 Wn.2d 575, 354 P.2d 702 (1960); Mossman v. Rowley, 154 Wn.App. 735, 229 P.3d 812 (2009); State v. Souther, 100 Wn.App. 701, 998 P.2d 350 (2000); Wood v. City of Bellingham, 62 Wn.App. 61, 813 P.2d 142 (1991); Hammel v. Rife, 37 Wn.App. 577, 682 P.2d 949 (1984).

[Current as of February 2021.]

WPI 70.03**RIGHT OF WAY OF A PEDESTRIAN WITHIN A
CROSSWALK**

A pedestrian within a crosswalk has the right to assume that all drivers of approaching vehicles will yield the right of way to the pedestrian. This right continues until the pedestrian knows otherwise or until surrounding circumstances should have alerted the pedestrian to the fact that an approaching vehicle is not going to yield the right of way to the pedestrian. Absent such circumstances, a pedestrian within a crosswalk has no duty to look for approaching vehicles.

NOTE ON USE

Use this instruction in all cases involving pedestrians within crosswalks. This instruction is not applicable if traffic control signals are involved or if the pedestrian fails to use an available pedestrian tunnel or overhead crossing.

Use WPI 70.03.01 (Driver Approaching a Crosswalk—Duty to Observe) and WPI 70.03.02 (Driver Approaching a Crosswalk—Duty to Stop) with this instruction.

Use WPI 70.03.04 (Pedestrian Crossing a Roadway Outside of a Crosswalk), as well as the appropriate definitional instruction from WPI 70.03.05 (Crosswalk—Definition) with this instruction if there is an issue as to whether or not a pedestrian was in a crosswalk.

See the Comment below when there is an issue as to whether the pedestrian should have observed oncoming traffic after entering a crosswalk.

COMMENT

Overview of the crosswalk instructions. In 2010, the WPI Committee substantially rewrote the crosswalk instructions in an effort to more completely explain the law in this area to jurors. These revised instructions set forth: a pedestrian's right of way in a crosswalk (WPI 70.03); the duties of a driver approaching a crosswalk (WPI 70.03.01 and 70.03.02); the duty of a pedestrian before entering a crosswalk (WPI 70.03.03); the law relating to pedestrians crossing a roadway

outside of a crosswalk (WPI 70.03.04); and the definition of crosswalk (WPI 70.03.05).

WPI 70.03. Prior to 2010, the instruction set forth the statutory duties under RCW 46.61.235 of a driver approaching a crosswalk. These duties are now set forth in WPI 70.03.02 (Duty of a Driver Approaching a Crosswalk to Stop).

This instruction sets forth a pedestrian's right of way in a crosswalk based on the holdings of *Jung v. York*, 75 Wn.2d 195, 449 P.2d 409 (1969), *Clements v. Blue Cross of Washington & Alaska*, 37 Wn.App. 544, 682 P.2d 942 (1984), and *Burnham v. Nehren*, 7 Wn.App. 860, 863, 503 P.2d 122 (1972). These cases stand for the proposition that a pedestrian lawfully within a marked crosswalk has an "exceedingly strong" right-of-way, and has a right to rely on this protection and assume that drivers will respect it until the pedestrian knows or should know otherwise. See *Burnham*, 7 Wn.App. at 863. As stated in *Jung*:

A pedestrian cannot at one and the same time have a right to assume that the right of way will be yielded and a duty to look to make sure that it is. In the absence of circumstances which would alert the pedestrian rightfully in the crosswalk to the fact that an approaching vehicle is not going to yield, negligence cannot be predicated on his failure to look and see the vehicle in time to avoid the accident.

Jung, 75 Wn.2d at 198.

After entering a crosswalk and establishing his or her course, a pedestrian is not negligent for failure to keep a further lookout. See *Jerdal v. Sinclair*, 54 Wn.2d 565, 342 P.2d 585 (1959) (it was not negligence for a pedestrian to exercise his statutory right of way where, had he seen the automobile that struck him, it would have been permissible for him to assume that the driver would yield the right of way as required by law); *Burnham*, 7 Wn.App. at 863. In *Jung*, a woman entered a marked crosswalk. As she crossed, a car stopped, yielding the right-of-way. She proceeded in front of this car, entered the next lane, and was struck by a car. The Washington Supreme Court held that based on this evidence, Ms. Jung had no duty to stop at various points along the marked crosswalk and look for vehicles that might violate or disregard her lawful right-of-way:

[W]hether or not she could have avoided the accident by stopping one quarter of the way across the intersection and looking, it cannot be held that she had a duty to do so or that the jury would be justified in finding on the evidence in the record that she was negligent if she failed to do so.

Jung, 75 Wn.2d at 197.

In *Clements v. Blue Cross of Washington & Alaska*, 37 Wn.App. 544, 682 P.2d 942 (1984), the plaintiff-pedestrian attempted to cross four lanes of an arterial in Seattle within the crosswalk. As she crossed, a car stopped for her at the crosswalk. After passing in front of the stopped car, she was struck by a car traveling through the next lane. The evidence was "undisputed that Clements [the pedestrian] was looking straight ahead or down in front of her as she walked." *Clements*, 37 Wn.App. at 550. As a matter of law, the pedestrian had no duty to try to observe oncoming traffic:

Plaintiff . . . asserts that the law does not impose a duty to look upon a pedestrian lawfully within a marked crosswalk even if the light changed against her as she crossed. Clements correctly states the general rule. See *Riddel v. Lyon*, 124 Wash. 146, 149, 213 P.487 (1923). Therefore, Clements' failure to look or to make any effort to observe oncoming traffic even after the light changed to red before she passed the stopped car, standing alone, does not amount to negligence.

Clements, 37 Wn.App. at 550.

On the other hand, a pedestrian in a crosswalk may have a duty to observe oncoming traffic in some circumstances. In *Oberlander v. Cox*, 75 Wn.2d 189, 193–194, 449 P.2d 388 (1969), a case decided on the same day as *Jung*, the Supreme Court held that the issue of a pedestrian's contributory negligence should have gone to the jury under the circumstances of the case:

Although the pedestrian crosswalk provides a strong protection, it is not an absolute sanctuary; and although reduced visibility—even in a heavy fog—does not lessen the right-of-way protection but engenders even greater vigilance on the driver's part, the circumstances and conditions prevailing at the crosswalk may require increased vigilance upon the part of the pedestrian, too.

Plaintiff said that she looked in both directions before stepping off the curb and into the crosswalk; the weather was foul and visibility diminished by a driving rain; she walked rapidly, carrying some packages; she did not look for approaching vehicles again apparently after entering the crosswalk. All of these circumstances, when related to the conditions prevailing, while not amounting perhaps to strong proof of contributory negligence, nevertheless supply some substantial evidence from which a jury could infer contributory negligence.

Oberlander, 75 Wn.2d at 193–94.

In some cases, it may be necessary to modify the instruction. In *Hooper v. Corliss*, 146 Wash. 50, 261 P. 645 (1927), a case predating the enactment of the pedestrian right-of-way statutes, the court held it was error to refuse a requested instruction that the rights of way are relative when both parties were claiming the right of way. On the other hand, when the pedestrian in the crosswalk was in plain view of the approaching driver such an instruction should not be given. *Oberlander*, 75 Wn.2d at 193–94; *Daley v. Stephens*, 64 Wn.2d 806, 394 P.2d 801 (1964).

A bicyclist in a crosswalk has the same right of way as a pedestrian. RCW 46.61.235; *Pudmaroff v. Allen*, 138 Wn.2d 55, 977 P.2d 574 (1999). RCW 46.61.235 was amended to include a “personal delivery device” as another entity protected in this crosswalk statute. Laws of 2019, Chapter 214, § 12. An additional definition of personal delivery device may be useful. RCW 46.61.733 and 46.75.010(4). See discussion in the Comment to WPI 70.02.04 (Right of Way—Emerging from Alley, Driveway, or Building in Business or Residence District) and the Comment to WPI 70.03.03 (Duty of a Pedestrian Before Entering a Crosswalk).

[Current as of February 2021.]

WPI 70.03.02

DRIVER APPROACHING A CROSSWALK—DUTY TO STOP

A statute provides that the driver of an approaching vehicle shall stop and remain stopped to allow a [[pedestrian] [bicycle] [personal delivery device]] to cross the roadway within a crosswalk when the [[pedestrian] [bicycle] [personal delivery device]] is [upon the roadway on which the vehicle is traveling or onto which it is turning] [either upon, or within one lane of, the half of the roadway on which the vehicle is traveling or onto which it is turning].

NOTE ON USE

Use this instruction in all cases involving a driver approaching a crosswalk, whether marked or unmarked. As applicable, use WPI 70.03.01 (Driver Approaching a Crosswalk—Duty to Observe) with this instruction.

Use the first bracketed phrase of this instruction when the pedestrian was upon the roadway of either a two-lane street or a one-way street regardless of the number of lanes of the one-way street. Use the second bracketed phrase when the pedestrian was upon the roadway of road with two-way traffic having more than two lanes. Use other bracketed phrases as applicable. See Comment below.

Use this instruction with WPI 70.03 (Right of Way of a Pedestrian Within a Crosswalk), as applicable.

Use this instruction with the appropriate definition from WPI 70.03.05 (Crosswalk—Definition) if there is an issue as to whether or not a pedestrian was in a crosswalk.

Use WPI 60.03 (Violation of Statute, Ordinance, Administrative Rule, or Internal Governmental Policy—Evidence of Negligence) with this instruction.

A definition of Personal delivery device may be crafted if it will be helpful for the jury. See the Comment to WPI 70.02.04 (Right of Way—Emerging from Alley, Driveway, or Building in Business or Residence District).

COMMENT

RCW 46.61.235(1). This statute was amended to include a “personal delivery device” among the entities protected. Laws of 2019, Chapter 214, § 12. The revised instruction follows the statutory language.

An additional definition of personal delivery device may be useful. RCW 46.61.733 and 46.75.010(4). See discussion in the Comment to WPI 70.02.04 (Right of Way—Emerging from Alley, Driveway, or Building in Business or Residence District) and the Comment to WPI 70.03.03 (Duty of a Pedestrian Before Entering a Crosswalk).

The first bracketed phrases of this instruction are based on the two duties established by the statute dependent on facts. A motorist must stop for any pedestrian in a crosswalk of either a two-lane road or any one-way road regardless of the number of lanes when the pedestrian is upon the roadway on which the motorist is traveling or onto which the motorist is turning. In addition, a motorist must stop for any pedestrian in a crosswalk of a road with two-way traffic consisting of more than two lanes when the pedestrian is either upon, or within one lane of, the half of the roadway on which the vehicle is traveling or onto which it is turning.

Care should be taken when looking at cases decided before the enactment of the Tort Reform Act, RCW 5.40.050 in 1986. For example, in *Daley v. Stephens*, 64 Wn.2d 806, 394 P.2d 801 (1964), the court held that a driver is negligent as a matter of law if he or she fails to yield the right-of-way to a pedestrian in a crosswalk in the absence of evidence of unusual circumstances. However, RCW 5.40.050, enacted in 1986, modifies *Daley*. The statute abrogates the doctrine of negligence per se in most instances and provides that evidence of a statutory violation may be considered as evidence of negligence. See WPI 60.03 (Violation of a Statute, Ordinance, Administrative Rule, or Internal Governmental Policy—Evidence of Negligence).

[Current as of February 2021.]

WPI 70.03.03

DUTY OF A PEDESTRIAN BEFORE ENTERING A
CROSSWALK

Before entering a crosswalk, a [[pedestrian] [bicycle] [personal delivery device]] has a duty to look for approaching vehicles. A statute provides that no [[pedestrian] [bicycle] [personal delivery device]] shall suddenly leave a curb or other place of safety and walk, run, or otherwise move into the path of a vehicle that is so close that it is impossible for the driver to stop.

NOTE ON USE

Use this instruction with WPI 70.03 (Right of Way of a Pedestrian Within a Crosswalk), as applicable. Use WPI 11.01 (Contributory Negligence—Definition) and WPI 11.07 (Determining the Degree of Contributory Negligence) with this instruction as applicable.

Use WPI 60.03 (Violation of Statute, Ordinance, Administrative Rule, or Internal Governmental Policy—Evidence of Negligence) with this instruction.

Use bracketed material as applicable.

A definition of Personal delivery device may be crafted if it will be helpful for the jury. See the Comment to WPI 70.02.04 (Right of Way—Emerging from Alley, Driveway, or Building in Business or Residence District).

COMMENT

This instruction was amended for this edition, and is based in part on RCW 46.61.235(2) and in part on *Burnham v. Nehren*, 7 Wn.App. 860, 503 P.2d 122 (1972). *Burnham* details the duties of a pedestrian in approaching and entering a crosswalk. See also *Beireis v. Leslie*, 35 Wn.2d 554, 214 P.2d 194 (1950); *Farrow v. Ostrom*, 10 Wn.2d 666, 117 P.2d 963 (1941) (the question of whether or not a pedestrian exercised reasonable care in observing traffic conditions before entering a crosswalk is one of fact for the jury); *Alston v. Blythe*, 86 Wn.App. 26, 943 P.2d 692 (1997).

RCW 46.61.235(2) was amended to include a “personal delivery device” as a protected entity under this crosswalk provision:

No pedestrian, bicycle, or personal delivery device shall suddenly leave a curb or other place of safety and walk, run, or otherwise move into the path of a vehicle which is so close that it is impossible for the driver to stop.

Laws of 2019, Chapter 214, § 12. An additional definition of personal delivery device may be useful. RCW 46.61.733 and 46.75.010(4). See discussion in the Comment to WPI 70.02.04 (Right of Way—Emerging from Alley, Driveway, or Building in Business or Residence District) and the Comment to WPI 70.03.03 (Duty of a Pedestrian Before Entering a Crosswalk).

Care should be taken when looking at cases decided before the enactment of the Tort Reform Act, RCW 5.40.050 in 1986. Earlier cases held that the failure of a pedestrian to look for oncoming vehicles from a place of safety before entering a crosswalk constituted contributory negligence as a matter of law. See, e.g., *Iwata v. Champine*, 74 Wn.2d 844, 447 P.2d 175 (1968); *Hamblet v. Soderburg*, 189 Wash. 449, 65 P.2d 1267 (1937). However, RCW 5.40.050, enacted in 1986, modifies these cases and abrogates the doctrine of negligence per se in most instances. The statute provides that evidence of a statutory violation may be considered as evidence of negligence. See WPI 60.03 (Violation of a Statute, Ordinance, Administrative Rule, or Internal Governmental Policy—Evidence of Negligence).

Poor visibility due to weather conditions does not lessen the protection of a crosswalk unless a pedestrian suddenly leaves a place of safety or walks or runs into path of a vehicle so close as to make it impossible for the driver to yield. *Oberlander v. Cox*, 75 Wn.2d 189, 449 P.2d 388 (1969).

[Current as of February 2021.]

WPI 70.03.04**PEDESTRIAN CROSSING A ROADWAY OUTSIDE OF
A CROSSWALK**

A statute provides that a [[pedestrian] [bicycle] [personal delivery device]] crossing a roadway at any point other than within a crosswalk shall yield the right of way to all vehicles upon the roadway.

NOTE ON USE

Use this instruction in cases involving pedestrians crossing a roadway at any point other than within a crosswalk.

If the existence of a crosswalk cannot be decided as a matter of law, then also use WPI 70.03 (Right of Way of a Pedestrian Within a Crosswalk) and the appropriate definition of crosswalk from WPI 70.03.05.

Use WPI 60.03 (Violation of Statute, Ordinance, Administrative Rule, or Internal Governmental Policy—Evidence of Negligence) with this instruction.

Use bracketed language as appropriate.

A definition of Personal delivery device may be crafted if it will be helpful for the jury. See the Comment to WPI 70.02.04 (Right of Way—Emerging from Alley, Driveway, or Building in Business or Residence District).

COMMENT

RCW 46.61.240(1). This crosswalk statute was amended to include a personal delivery device as a protected entity. Laws of 2019, Chapter 214, § 13. An additional definition of personal delivery device may be useful. RCW 46.61.733 and 46.75.010(4). See discussion in the Comment to WPI 70.02.04 (Right of Way—Emerging from Alley, Driveway, or Building in Business or Residence District) and the Comment to WPI 70.03.03 (Duty of a Pedestrian Before Entering a Crosswalk).

The duties and rights of pedestrians crossing the roadway vary depending on whether the pedestrian crosses in a crosswalk or not. To avoid confusion between these various duties, the WPI Committee has drafted separate instructions for each situation. See the Comment to WPI 70.03 (Right of Way of a Pedestrian Within a Crosswalk).

In *Sulkosky v. Brisebois*, 49 Wn.App. 273, 742 P.2d 193 (1987), the court held that the trial court properly instructed that the duty of a pedestrian to yield the right of way to all vehicles when crossing at any point other than within a crosswalk extends to backing vehicles that are upon the roadway.

It is error to instruct solely in the language of the statute when the person on foot is not crossing the roadway but is attending a stalled vehicle. The statutory language relating to a pedestrian refers expressly to a person crossing a roadway. *Stewart v. State*, 92 Wn.2d 285, 597 P.2d 101 (1979).

A police officer on foot controlling traffic on the highway is a person engaged in work on the highway under RCW 46.61.030 and is not a pedestrian under RCW 46.61.240(1). *Dailey v. Lange*, 20 Wn.App. 12, 578 P.2d 1322 (1978); see also WPI 71.04 (Persons or Vehicles at Work on Road).

Before 2010, the language in this instruction was part of the former version of WPI 70.03.

[Current as of February 2021.]

WPI 70.03.05**CROSSWALK—DEFINITION**

[A marked crosswalk means any portion of a roadway distinctly indicated for pedestrian crossing by lines or other markings on the surface of the roadway.]

[A crosswalk exists at every intersection of roadways, regardless of whether the roadway is marked with crosswalk lines. The crosswalk is an extension of the existing curbing and sidewalks. The width of the crosswalk is from the curbing to the farthest edge of the sidewalk. The crosswalk extends across the roadway to the opposite side curbing and sidewalk.]

[A crosswalk exists at every intersection of roadways, regardless of whether the roadway is marked with crosswalk lines. An intersection is defined as the area where roadways meet and vehicles traveling upon the different roadways may collide. The crosswalk extends across the roadway at the same angle as the roadways meet. The crosswalk is 10 feet wide. It begins at the edge of the intersection and extends 10 feet back from the intersection. [Existing curbing defines the edge of the intersection.]]

NOTE ON USE

Select the appropriate definition or definitions when it will be useful for the jury or when there is an issue of fact as to whether or not a pedestrian was within a crosswalk at the time of the collision. The second paragraph should be used only if the intersection has sidewalks. The third paragraph refers to an unmarked crosswalk on a roadway without sidewalks. The last bracketed sentence of the third paragraph should only be used when there is curbing.

COMMENT

RCW 46.04.160; RCW 46.04.220; RCW 46.04.290; and RCW 46.04.500.

In *Krogh v. Pemble*, 50 Wn.2d 250, 310 P.2d 1069 (1957), the court

held that a statutory crosswalk exists whenever the requirements of RCW 46.04.160 are met. The existence of a marked crosswalk in another location does not act to abrogate the statutory crosswalk. However, local authorities may, with proper and clear signage, prohibit pedestrians from crossing at an area that would otherwise qualify as a crosswalk pursuant to RCW 46.04.160. *Hanson v. Anderson*, 53 Wn.2d 601, 335 P.2d 581 (1959).

When the markings of a marked crosswalk have been worn away so that they are no longer clearly visible, the crosswalk is no longer “marked” within the meaning of RCW 46.04.290. However, the area will still be treated as a crosswalk if the statutory requirements of RCW 46.04.160 exist. *Krogh*, 50 Wn.2d at 252–53.

The fact that an intersection is a “T” intersection, or that only one of the crosswalks at an intersection is marked, does not affect the existence of statutory unmarked crosswalks. *Krogh*, 50 Wn.2d at 252–23. When an intersection involves streets with sidewalks, an unmarked sidewalk exists at the “prolongation” of the sidewalks, even if this does not result in a crosswalk that connects the two sides of the street in a perpendicular line. *Coleman v. Altman*, 7 Wn.App. 80, 497 P.2d 1338 (1972). The unmarked crosswalk is the extension of the angle at which the roadways meet. *McKinney v. Preston Mill Co.*, 39 Wn.2d 681, 237 P.2d 788 (1951). The lack of sidewalks does not affect the existence of a statutory crosswalk. *Krogh*, 50 Wn.2d at 252–53.

Prior to 2010, this instruction was numbered WPI 70.03.01.

[Current as of February 2021.]

WPI 70.04**DUTY OF FOLLOWING DRIVER**

A statute provides that a driver shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of the vehicles and the traffic upon and the condition of the street or highway.

When one vehicle is following another vehicle, the primary duty of avoiding a collision rests upon the driver of the following vehicle. It may be considered evidence of negligence if the following vehicle collides with the vehicle ahead, in the absence of an emergency. The driver of the following vehicle is not necessarily excused even in the event of an emergency. It is the duty of the driver of the following vehicle to keep such distance and maintain such observation of the vehicle ahead that the following vehicle is able to safely stop if confronted by an emergency that is reasonably foreseeable from traffic conditions.

NOTE ON USE

Use WPI 60.03 (Violation of Statute, Ordinance, Administrative Rule, or Internal Governmental Policy—Evidence of Negligence) with this instruction. It may also be appropriate under some circumstances to use WPI 12.02 (Duty of One Confronted with an Emergency) in conjunction with this instruction.

COMMENT

RCW 46.61.145(1). RCW 46.61.145 was amended in 2019 to add additional sections (4)–(6) stipulating enhanced penalties in some circumstances for a traffic infraction arising out of the conduct of following too closely. Laws of 2019, Chapter 403, § 4. The instruction has not been amended.

This statute contains additional duties of a towing vehicle and of vehicles travelling in a caravan or motorcade. RCW 46.61.145(2) and (3). If the facts warrant, an additional instruction may be offered. See *Tao v. Li*, 140 Wn.App. 825, 166 P.3d 1263 (2007) (analyzing a principal and agent right to control the following driver in the caravan).

This instruction must be given if the case involves a following driver. *Bichl v. Poinier*, 71 Wn.2d 492, 429 P.2d 228 (1967) (citing *Van Ry v. Montgomery*, 58 Wn.2d 46, 360 P.2d 573 (1961)); see also *Lidel v. Kelly*, 52 Wn.2d 238, 324 P.2d 817 (1958).

It is a well-established rule of law that in the absence of an emergency, the following driver is *prima facie* negligent if that driver runs into the vehicle ahead. *Vanderhoff v. Fitzgerald*, 72 Wn.2d 103, 431 P.2d 969 (1967); *Miller v. Cody*, 41 Wn.2d 775, 252 P.2d 303 (1953); *Martini v. State*, 121 Wn.App.150, 173–74, 89 P.3d 250 (2004) (addressing when an instruction on following too close is warranted). Even an emergency will not excuse the following driver if the emergency arose out of ordinary traffic conditions or was an emergency that the driver should have reasonably anticipated. See *Izett v. Walker*, 67 Wn.2d 903, 410 P.2d 802 (1966), and *Billington v. Schaal*, 42 Wn.2d 878, 259 P.2d 634 (1953), both affirming instructions referring to emergency stops dictated by ordinary traffic conditions.

When the driver of the vehicle in front (“preceding driver”) acts in an unusual or unexpected manner that the following driver could not reasonably anticipate, a finding that the following driver was negligent as a matter of law in colliding with the preceding vehicle may be precluded. *James v. Niebuhr*, 63 Wn.2d 800, 389 P.2d 287 (1964) (suddenly stopping at a place where a stop is not anticipated); *Vanwagenen v. Roy*, 21 Wn.App. 581, 587 P.2d 173 (1978); *Ryan v. Westgard*, 12 Wn.App. 500, 530 P.2d 687 (1975). Under such circumstances the negligence of the following driver and the contributory negligence of the preceding driver are questions of fact; the jury decides whether the preceding driver’s conduct should have been anticipated. See *Rhoades v. DeRosier*, 14 Wn.App. 946, 546 P.2d 930 (1976).

In a contributory negligence context, the Court of Appeals approved an instruction that informed the jury that it is a violation of a statute (RCW 46.61.560) for a driver to “stop, park, or leave standing” any vehicle upon the roadway. *Palmer v. Jensen*, 81 Wn.App. 148, 154, 913 P.2d 413 (1996) (rear-end collision case).

This instruction does not apply to a “changing lanes” situation. See *Roumel v. Fude*, 62 Wn.2d 397, 383 P.2d 283 (1963); *Grapp v. Peterson*, 25 Wn.2d 44, 168 P.2d 400 (1946). This instruction likewise does not apply to an overtaking and passing case, because one car is not following the other in such a situation. This instruction does not apply to a rear end collision with a car that was stopped on the roadway and never was followed by the other car. *Szupkay v. Cozzetti*, 37 Wn.App. 30, 678 P.2d 358 (1984); *Svehaug v. Donoghue*, 5 Wn.App. 817, 490 P.2d 1345 (1971).

[Current as of February 2021.]

WPI 70.05

SPEED

A statute provides that no person shall drive a vehicle at a speed greater than is reasonable and prudent under the conditions, having regard to the actual and potential hazards then existing. The driver shall control speed to avoid colliding with others who are complying with the law and using reasonable care.

[The statute provides that a driver shall drive at an appropriate reduced speed [when approaching and crossing an intersection] [when approaching and crossing a railway grade crossing] [when approaching and going around a curve] [when approaching a hill crest] [when traveling upon any narrow or winding roadway] [when special hazard exists with respect to pedestrians or other traffic] [when special hazard exists by reason of weather or highway conditions.]]

[The maximum statutory speed limit at [(describe place (e.g., street, highway, mile marker, nearby intersection, etc.))] [the place here involved] was _____ miles per hour.]

NOTE ON USE

Use bracketed material as applicable. The bracketed factors in the second paragraph should be used only when a specific factor is involved in the case.

In the third paragraph, the bracketed sentence on the maximum speed limit should be used only when appropriate. Insert a description of the incident location if that is agreed or use the bracketed phrase as appropriate.

Use WPI 60.03 (Violation of Statute, Ordinance, Administrative Rule, or Internal Governmental Policy—Evidence of Negligence) with this instruction.

COMMENT

RCW 46.61.400.

The factors to be considered under the statute and the proof needed to support a finding of excessive speed are discussed in *Grobe v. Valley Garbage Service, Inc.*, 87 Wn.2d 217, 551 P.2d 748 (1976). The speed instruction is properly refused when excessive speed is not a proximate cause or if a conclusion of speed is merely speculation. *Chhuth v. George*, 43 Wn.App. 640, 719 P.2d 562 (1986).

For a detailed discussion of when a favored driver's speed constitutes a proximate cause, see *Channel v. Mills*, 77 Wn.App. 268, 890 P.2d 535 (1995); see also *Theonnes v. Hazen*, 37 Wn.App. 644, 681 P.2d 1284 (1984).

In *Mina v. Boise Cascade Corp.*, 37 Wn.App. 445, 681 P.2d 880 (1984), affirmed, 104 Wn.2d 696, 710 P.2d 184 (1985), the court held that the question whether the plaintiff was traveling at an unreasonably slow speed was properly presented to the jury under RCW 46.61.400.

Evidence of speed eight miles in excess of the posted speed limit on a dark and wet road by a driver unfamiliar with the area using low beams because of a mechanical problem supported the giving of the "speed for special hazard" instruction. *Holmes v. Wallace*, 84 Wn.App. 156, 163-64, 926 P.2d 339 (1996).

[Current as of February 2021.]

WPI 70.06

**RIGHT TO ASSUME OTHERS WILL OBEY LAW—
STREETS OR HIGHWAYS**

Every person using a public street or highway has the right to assume that other persons thereon will use ordinary care and will obey the rules of the road and has a right to proceed on such assumption until he or she knows, or in the exercise of ordinary care should know, to the contrary.

NOTE ON USE

Use this instruction, as applicable, for negligence cases involving streets, roads, or highways. For other negligence cases, see WPI 12.07 (Right to Assume Others Will Exercise Ordinary Care).

COMMENT

In *Kelsey v. Pollock*, 59 Wn.2d 796, 370 P.2d 598 (1962), the court held, under the facts of the case, it was reversible error to refuse to give this instruction. The defendant in *Kelsey* presented evidence that the favored driver failed to look at all before entering the intersection, thus this fact became a factual issue relating to proximate cause of the collision. See also *Torrez v. Peck*, 57 Wn.2d 302, 356 P.2d 703 (1960).

It is not error to give WPI 70.06 in combination with WPI 70.01 (General Duty—Driver or Pedestrian) and WPI 12.06 (Duty of Seeing). *Hammel v. Rife*, 37 Wn.App. 577, 682 P.2d 949 (1984) (each instruction correctly states the law and each covers a different legal point so they are not unduly repetitious).

For a discussion concerning the use of WPI 70.06 when there is an emergency vehicle, see *Brown v. Spokane Cnty. Fire Protection Dist. No. 1*, 100 Wn.2d 188, 668 P.2d 571 (1983); see also the Comment to WPI 71.05 (Emergency Vehicles—Right of Way).

[Current as of February 2021.]

WPI 70.08

USE OF SAFETY BELTS

COMMENT

RCW 46.61.688(3), (4), and (6). RCW 46.61.688 was originally enacted in 1986. Since that time, the Legislature has amended the statute a number of times to require seat belts in more types of vehicles and to require the use of seat belts in an increasing number of circumstances.

RCW 46.61.688(6) provides, however, that: "Failure to comply with the requirements of this section does not constitute negligence, nor may failure to wear a safety belt assembly be admissible as evidence of negligence in any civil action."

The Washington Supreme Court has held that there is no common law duty to wear a seatbelt. *Amend v. Bell*, 89 Wn.2d 124, 134, 570 P.2d 138 (1977); *Derheim v. N. Fiorito Co.*, 80 Wn.2d 161, 172, 492 P.2d 1030 (1972); accord *Patterson v. Horton*, 84 Wn.App. 531, 540, 929 P.2d 1125 (1997) (historical discussion of Washington's seat belt laws).

RCW 46.61.688(6) applies equally to a situation in which a child is not strapped into an appropriate child restraint device or seat belt. See *Patterson*, 84 Wn.App. at 540–41 (affirming dismissal of an action against the driver for "negligent restraint"); see also RCW 46.61.687.

[Current as of February 2021.]

WPI 70.09

BICYCLISTS—STATUTORY RIGHTS AND DUTIES

A person riding a bicycle upon a roadway has all the rights of a driver of a motor vehicle and must obey all statutes governing the operation of vehicles except for those statutes that, by their nature, can have no application.

NOTE ON USE

Use with WPI 60.03 (Violation of Statute, Ordinance, Administrative Rule, or Internal Governmental Policy—Evidence of Negligence) when the violation of a statute, ordinance, or administrative rule by a bicyclist is introduced as evidence of the bicyclist's negligence or contributory negligence. Under most circumstances, the question of whether a statute has application to bicyclists will be decided by the court as a matter of law.

Care should be taken with regard to the incident date. See Comment below.

COMMENT

RCW 46.61.755(1) was amended by Laws of 2020, Chapter 66, § 4.

For incidents occurring before October 1, 2020, the statute provides:

- (1) Every person riding a bicycle upon a roadway shall be granted all of the rights and shall be subject to all of the duties applicable to the driver of a vehicle by this chapter, except as to special regulations in RCW 46.61.750 through 46.61.780 and except as to those provisions of this chapter which by their nature can have no application.
- (2) Every person riding a bicycle upon a sidewalk or crosswalk must be granted all of the rights and is subject to all of the duties applicable to a pedestrian by this chapter.

Effective October 1, 2020, section one (1) of RCW 46.61.755 was amended to add clear reference to another statute, RCW 46.61.100:

- (1) Every person riding a bicycle upon a roadway shall be granted all of the rights and shall be subject to all of the

duties applicable to the driver of a vehicle by this chapter, except as to special regulations in RCW 46.61.750 through 46.61.780, except as provided in RCW 46.61.190, and except as to those provisions of this chapter which by their nature can have no application.

RCW 46.61.755(1).

The reference to RCW 46.61.190 in RCW 46.61.755(1) (italicized above) seems to refer to the following language from RCW 46.61.190(2) (b)(ii) and (iii):

(ii) A person operating a bicycle approaching a stop sign located at a highway grade crossing of a railroad must follow the requirements of RCW 46.61.345.

(iii) A person operating a bicycle approaching a “stop” signal in use by a school bus, as required under RCW 46.37.190, must follow the requirements of RCW 46.61.370.

Bicyclists on a roadway are subject to the general traffic laws as well as to additional requirements that are set out in RCW 46.61.750 to 780. Absent a statutory exclusion, RCW 46.61.750 to 780 apply “when-ever a bicycle is operated upon any highway or upon any bicycle path.” RCW 46.61.750(2). In *Pudmaroff v. Allen*, 138 Wn.2d 55, 63, 977 P.2d 574 (1999), the court raised, but did not decide, the question of whether the phrase “bicycle path” as used in RCW 46.61.750(2) refers to bicycle lanes on a roadway or to a bicycle path that is separated from roadways or to multi-use trails.

A minor operating a bicycle is subject to the general traffic regulations. However, a motorist “must exercise a higher degree of care for the safety of a minor using the highway, when the motorist observes the minor in a position of peril.” *Johnson v. N. Pac. Ry. Co.*, 66 Wn.2d 614, 618, 404 P.2d 444 (1965).

A bicyclist in a crosswalk is not subject to general traffic rules and is entitled to the protections of a pedestrian. RCW 46.61.755(2); *Pudmaroff*, 138 Wn.2d at 60–66; *Crawford v. Miller*, 18 Wn.App. 151, 566 P.2d 1264 (1977).

[Current as of February 2021.]

CHAPTER 71

EMERGENCY AND ROADWORK VEHICLES

- WPI 71.01 Emergency Vehicles—Privileges When Authorized
- WPI 71.02 Authorized Emergency Vehicle—Requirements
- WPI 71.04 Persons or Vehicles at Work on Road
- WPI 71.05 Emergency Vehicles—Right of Way

WPI 71.01

EMERGENCY VEHICLES—PRIVILEGES WHEN AUTHORIZED

[[Plaintiff's] [Defendant's] vehicle was an authorized emergency vehicle.] When an authorized emergency vehicle is [responding to an emergency call] [in the pursuit of an actual or suspected violator of the law] [and if an authorized signal is being sounded] [and if the special lights on the vehicle are in operation] [when and to the extent reasonably necessary to warn pedestrians and other drivers of its approach,] the driver of the emergency vehicle is privileged:

- (1) To park or stand, irrespective of the provisions of the law applicable to motorists generally;
- (2) To proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation;
- (3) To exceed the maximum speed limits so long as life or property is not endangered;
- (4) To disregard regulations governing direction of movement or turning in specified directions.

These privileges granted to an authorized emergency

vehicle do not relieve its driver from the duty to drive with due regard for the safety of all persons under all of the circumstances, including the circumstances of the emergency. [Furthermore, these privileges do not protect the driver from the consequences of any reckless disregard of the safety of others.]

The duty to drive with due regard for the safety of all persons means a duty to exercise ordinary care under all of the circumstances.

Except for the privileges enumerated and the conditions here set forth when those privileges may be exercised, the driver of an authorized emergency vehicle is subject to the laws applicable to other drivers.

NOTE ON USE

The first bracketed sentence of this instruction is to be used when the court can rule as a matter of law that the vehicle is an authorized emergency vehicle and is properly equipped with siren and special lights as required by statute. If factual questions preclude a ruling as a matter of law on this issue, use WPI 71.02 (Authorized Emergency Vehicle—Requirements) with this instruction.

Use WPI 71.06 (Emergency Vehicles—Nonprivileged Situations as a Matter of Law) instead of this instruction when the court is able to conclude as a matter of law that the vehicle failed to qualify as an emergency vehicle.

Select the bracketed phrase in the first paragraph that describes the particular type of emergency run involved in the case. The bracketed phrase referring to special lights should be used only when statutorily required or otherwise applicable. See Comment to WPI 71.02 (Authorized Emergency Vehicle—Requirements.)

Always use WPI 10.01 (Negligence—Adult—Definition) and WPI 10.02 (Ordinary Care—Adult—Definition) with this instruction.

COMMENT

RCW 46.61.035 and RCW 46.37.190.

RCW 46.37.380 contains the requirement that the siren shall be

sounded when reasonably necessary to warn pedestrians and other drivers of the approach of the emergency vehicle.

The language in the instruction requiring the siren to be sounded “to the extent” reasonably necessary to warn other drivers of the approach of the emergency vehicle does not come from the statute. It is based on the holding in *Hall v. King County Fire District*, 67 Wn.2d 446, 408 P.2d 14 (1965). The court held that the question of whether an audible signal was given for a sufficient length of time prior to entering the intersection to afford the other driver a reasonable opportunity to yield the right of way is one of fact for the jury. Although *Hall* was decided based on an earlier version of RCW 46.61.210, this rationale would appear to be equally applicable under the current version of the statute.

Whether the vehicle is an authorized emergency vehicle and whether it is properly equipped with a siren and the special lights required by the statute for the particular vehicle usually will be a matter of law to be decided by the court. See Comment to WPI 71.02 (Authorized Emergency Vehicle—Requirements).

The general term “special lights” is used in the instruction because normally the jury will not be concerned with the type of lights required. The only jury issue will be whether the lights were in operation.

RCW 46.61.035(4) requires emergency responders making a high speed chase to act with due regard for the safety of others. The duty applies whether or not the police vehicle is directly involved in the collision. *Mason v. Bitton*, 85 Wn.2d 321, 534 P.2d 1360 (1975).

The third paragraph of this instruction is based on *Brown v. Spokane County Fire Protection District*, 100 Wn.2d 188, 668 P.2d 571 (1983), which reaffirms *Mason v. Bitton*, 85 Wn.2d 321, 534 P.2d 1360 (1975). *Brown* approved an instruction essentially in the language of WPI 71.01, including the paragraph stating that the duty to drive with due regard for the safety of others is governed by the standard of care set forth in the instructions on negligence and ordinary care. *Brown*, 100 Wn.2d at 193, 195. Pursuant to *Brown*, neither the privileges granted to an emergency vehicle by RCW 46.61.035(2) nor the requirement of RCW 46.61.210(1) that the drivers of other vehicles yield the right of way relieves the driver of an emergency vehicle of the duty under RCW 46.61.035(4) to exercise due care for the safety of all persons. *Brown*, 100 Wn.2d at 194.

[Current as of March 2021.]

WPI 71.02**AUTHORIZED EMERGENCY
VEHICLE—REQUIREMENTS**

“Authorized emergency vehicle” means any vehicle of any fire department, police department, sheriff’s office, coroner, prosecuting attorney, Washington State Patrol, ambulance service, public or private, or any other vehicle authorized in writing by the Washington State Patrol to serve as an emergency vehicle.

[An authorized emergency vehicle must be equipped with at least one lamp capable of displaying a red light visible from a distance of at least 500 feet in normal sunlight and a siren capable of giving an audible signal.]

NOTE ON USE

Do not use this instruction if the first bracketed sentence of WPI 71.01 (Emergency Vehicles—Privileges When Authorized) is used. Use this instruction only when a question of fact exists as to whether the vehicle in question is an “authorized emergency vehicle.” The bracketed paragraph would normally be used only when the vehicle is not a police, fire department, or ambulance vehicle.

COMMENT

RCW 46.04.040; RCW 46.37.190.

The instruction has been modified for this edition for better juror comprehension. No substantive change is intended.

Even in the absence of written approval by the State Patrol, a motorcycle or vehicle routinely used to escort funeral processions may be considered a de facto emergency vehicle, if it is equipped with emergency equipment that complies with RCW 46.37.190 and that has been tested and approved by the State Patrol pursuant to RCW 46.37.194. *Boyle v. Emerson*, 17 Wn.App. 101, 104, 561 P.2d 1110 (1977).

The statutory requirements for sirens and special lights are set forth in RCW 46.37.184, RCW 46.37.190, RCW 46.37.380, RCW 46.61.035, and RCW 46.61.210. When there are factual issues concerning whether the emergency vehicle was properly equipped, this instruction may need to be modified to reflect the specific statutory requirements.

[Current as of March 2021.]

WPI 71.04**PERSONS OR VEHICLES AT WORK ON ROAD**

A statute provides that:

(Quote or paraphrase the applicable statute or statutes.)

This statute does not apply to the [plaintiff] [defendant] if [he] [she] was [operating a motor vehicle or other equipment while] engaged in work within the right-of-way of any highway at the time of the occurrence [unless [he] [she] was traveling to and from such work].

NOTE ON USE

Use this instruction if there is a jury question whether a violation of other statutes is avoided by the exceptions contained in RCW 46.61.030. Whether RCW 46.61.030 applies may be a matter of law. If the statute applies as a matter of law, this instruction is not needed.

Use WPI 60.03 (Violation of Statute, Ordinance, Administrative Rule, or Internal Governmental Policy—Evidence of Negligence) with this instruction.

Use bracketed material as applicable. Insert the statute or statutes claimed not to apply in the space provided in this instruction.

The giving of this instruction may be unnecessary if adjustments are made to WPI 20.01 (Issues), and the jury is not instructed on the applicable statutes.

COMMENT

RCW 46.61.030.

The statute excuses what would otherwise be a violation of law and is strictly construed. *Groves v. Meyers*, 35 Wn.2d 403, 213 P.2d 483 (1950). Outside of the exempted statutory situations the usual rules of negligence apply:

[A] workman in the street has a special status which must be considered in determining whether he has exercised due care for his own safety. A worker is not required to exercise the same degree of care required of an ordinary pedestrian, but must exercise that

care which an ordinarily prudent man, similarly employed in the street, would and could take to avoid injury by passing vehicles.

A worker is not required to keep a constant lookout for approaching vehicles, and the question whether such a worker has exercised reasonable care for his own safety in view of his occupation and surrounding circumstances is for the jury under the rule stated above.

James v. Edwards, 68 Wn.2d 194, 196-97, 412 P.2d 123 (1966) (citations omitted); accord Burns v. Dills 68 Wn.2d 377, 413 P.2d 370 (1966) (a surveyor working in an unmarked crosswalk was entitled to the statutory protection).

The statute does not apply to vehicles traveling to and from the designated construction site, but only within it. Derheim v. N. Fiorito Co., 80 Wn.2d 161, 492 P.2d 1030 (1972). A police officer on foot, controlling traffic on the highway, is a person engaged in work on the highway within the meaning of the statute and is not a pedestrian under RCW 46.61.240(1). Dailey v. Lange, 20 Wn.App. 12, 578 P.2d 1322 (1978); accord Sutton v. Shufelberger, 31 Wn.App. 579, 586, 643 P.2d 920 (1982) (motorcycle officer struck while stepping off his bike to stop a traffic offender).

On highways that are part of the federal interstate highway system, the secretary of transportation may adopt standards, rules, and regulations relating to construction and maintenance. RCW 47.52.027.

The statutory duty to warn by signs or flaggers may still exist even though the activity being conducted is covered by RCW 46.61.030. See RCW 47.36.200. Drivers engaged in construction repair or maintenance work are required to obey such signs and flaggers. RCW 47.36.200.

[Current as of March 2021.]

WPI 71.05

EMERGENCY VEHICLES—RIGHT OF WAY

A statute provides that upon the immediate approach of an authorized emergency vehicle making use of its siren [and its special lights], the driver of every other vehicle shall yield the right of way and shall immediately drive to a position parallel to, and as close as possible to, the right hand edge or curb of the roadway clear of any intersection and shall stop and remain in such position until the authorized emergency vehicle has passed.

NOTE ON USE

The bracketed phrase on special lights is not to be used for a police vehicle.

Use WPI 60.03 (Violation of Statute, Ordinance, Administrative Rule, or Internal Governmental Policy—Evidence of Negligence) with this instruction.

If there is a jury question as to whether the other driver was aware of the approach of the emergency vehicle or had an excuse or justification for not hearing the siren or seeing the special lights, use the bracketed last paragraph of WPI 60.03 (Violation of Statute, Ordinance, Administrative Rule, or Internal Governmental Policy—Evidence of Negligence). In such a case, the bracketed paragraph could be tailored specifically to the issue by substituting language such as: “if it was due to a failure to hear the siren [which ordinary care could not have guarded against].”

COMMENT

RCW 46.61.210.

The statute requires the drivers of all vehicles to yield the right of way upon the approach of an emergency vehicle making the proper signal, “except when otherwise directed by a police officer.” Long ago, the statutory phrase “except when otherwise directed by a police officer” was removed from the pattern instruction. If directions by a police officer are claimed as an excuse or justification for a statutory violation, an instruction will need to be drafted to fit the specific situation. This may involve a definition of who qualifies as a police officer for that purpose.

Even if the operator of the emergency vehicle was complying with applicable statutes concerning sirens, the duty to yield may be excused if the other driver did not hear and, with the exercise of ordinary care, reasonably could not have heard the siren. *Grabos v. Loudin*, 60 Wn.2d 634, 374 P.2d 673 (1962).

The driver of an emergency vehicle has the right to assume that other drivers will yield the right of way as required by law until it is otherwise apparent. However, at no point, including circumstances in which another driver fails to yield the right of way, is the driver of an emergency vehicle relieved of the duty to drive with due regard for the safety of all persons. *Brown v. Spokane Cnty. Fire Prot. Dist.*, 100 Wn.2d 188, 668 P.2d 571 (1983).

In addition to yielding to an on-coming or following emergency vehicle as required by RCW 46.61.210, any driver approaching an emergency or work zone as defined in RCW 46.61.212 also must take action upon approach to a stationary or slow-moving designated emergency vehicle. Depending on the number of roadway lanes of travel, and with due regard for traffic and road conditions, any driver must yield, make a lane change, and/or slow to 10 miles below the posted limit to avoid adjacent lane proximity to emergency vehicles with operating emergency lights, tow trucks, emergency vehicles or work or construction vehicles with designated lights in operation. RCW 46.61.212.

[Current as of March 2021.]

CHAPTER 72

GUEST-PASSENGER—JOINT VENTURE— FAMILY CAR

- WPI 72.01 Definition of Guest in a Motor Vehicle
 - WPI 72.02 Duty of Driver to Guest
 - WPI 72.03 Negligence of Driver Not Attributable to Passenger
 - WPI 72.04 Joint Venture
 - WPI 72.05 Family Car Doctrine
-

WPI 72.01

DEFINITION OF GUEST IN A MOTOR VEHICLE

(WITHDRAWN)

COMMENT

This instruction was based on a doctrine that was abrogated in 1978. See *Roberts v. Johnson*, 91 Wn.2d 182, 588 P.2d 201 (1978).

[Current as of March 2021.]

WPI 72.02

DUTY OF DRIVER TO GUEST

(WITHDRAWN)

COMMENT

This instruction was based on a doctrine that was abrogated in 1978. See *Roberts v. Johnson*, 91 Wn.2d 182, 588 P.2d 201 (1978).

[Current as of March 2021.]

WPI 72.03

NEGLIGENCE OF DRIVER NOT ATTRIBUTABLE TO PASSENGER

Any negligence on the part of the driver of the vehicle in which the passenger was riding cannot be attributed to the passenger.

NOTE ON USE

This instruction is to be used only when the plaintiff is a passenger and the defendant is someone other than the driver of the car.

This instruction should not be used if it is claimed that the plaintiff and the driver were engaged in a joint venture or that the driver was the agent of plaintiff passenger for any other reason. If it is claimed that the plaintiff and the driver were in a joint venture, use WPI 72.04 (Joint Venture). If agency is claimed on some other basis, use the appropriate instructions from WPI Chapter 50 (Agency and Partnership—Torts).

If there is a claim that a plaintiff, as a passenger, was negligent through some conduct of his or her own, that phase of the case should be covered by appropriate instructions relating to the plaintiff's own negligence and this instruction should still be given.

COMMENT

A driver's negligence will not be imputed to a passenger unless there is an agency relationship between them or they are engaged in a joint venture. Restatement (Second) of Torts, § 495 cmt. c (1965), cited with approval, *Amrine v. Murray*, 28 Wn.App. 650, 658, 626 P.2d 24 (1981).

Although a driver's negligence may not be imputed to a passenger, the contributory negligence of the passenger may still be an issue. In *Amrine*, the court discussed the circumstances under which a passenger or guest in a vehicle commits acts of contributory negligence. *Amrine*, 28 Wn.App. at 657-58.

Specific statutes may limit the application of contributory negligence principles when the driver of the vehicle is intoxicated. See RCW 5.40.060 and the Comment to WPI 12.01.01 (Driver's Intoxication—Plaintiff Passenger's Knowledge).

[Current as of March 2021.]

WPI 72.04

JOINT VENTURE

The [plaintiff] [defendant] is responsible for any negligence of the driver of the car in which the [plaintiff] [defendant] [(insert name of party)] was riding if you find that the [plaintiff] [defendant] and the driver were engaged in carrying out a common purpose, with a community of interest, in a joint enterprise of a business or other nonsocial nature entered into for material gain or profit, and that the driving was connected with that common purpose.

If you find that they were not so engaged, then any negligence that you may find on the part of the driver cannot be charged to the [plaintiff] [defendant].

NOTE ON USE

Use bracketed material as applicable.

This instruction relates to a plaintiff or a defendant who is a passenger, when the adverse party to the suit is someone other than the driver of the car, and the claim is that the passenger is charged with the negligence of the driver of the car. If the driver is also a plaintiff or a defendant on the same side of the suit as the passenger, this instruction will have to be tailored to refer only to the plaintiff or defendant who is a passenger and not to the driver. This is best accomplished by referring to the respective plaintiffs or defendants by their names.

This instruction is not to be used in a suit between a passenger and the driver of the car.

Do not use this instruction in transportation for hire cases. See Comment below. For a case involving a common carrier, see WPI Chapter 11 (Common Carriers).

COMMENT

The basis of imputing negligence in a joint venture situation is agency. "Even in auto cases, we have never departed from the basic law of agency that only he who controls or has the right to control shall be liable." *Poutre v. Saunders*, 19 Wn.2d 561, 567, 143 P.2d 554 (1943). Most often the right of control is implied as a matter of law from the

common purpose of the parties. That common purpose must relate to an undertaking of a business or nonsocial nature and must be found in something other than the transportation for hire itself. *Poutre*, 19 Wn.2d at 568–69.

A joint undertaking of a business nature, for material gain or profit, is such a partnership even though limited to a single transaction, as by the law of agency establishes the right of control.

Poutre, 19 Wn.2d at 568 (punctuation omitted).

Poutre also holds that such a joint venture can exist by virtue of an actual agreement to the effect that each shall have the right of control regardless of who is in actual control of the vehicle. *Poutre*, 19 Wn.2d at 555–56. The factual situation in which it is claimed that there is such an express agreement as to the right of control is so uncommon that no pattern instruction is proposed to cover it.

Joint ownership or joint possession of a vehicle may give rise to vicarious liability even though there is no joint venture. *Combes v. Snow*, 56 Wn.2d 122, 351 P.2d 419 (1960).

[Current as of March 2021.]

WPI 72.05

FAMILY CAR DOCTRINE

A person who [owns] [maintains] [provides] a motor vehicle for the use of a member of his or her family is responsible for the acts of that individual in the operation of that motor vehicle.

NOTE ON USE

This instruction is designed for motor vehicles. It can be adapted for use in cases involving other vehicles or instrumentalities if it is determined that the same principles apply.

This instruction is to be used when the driver is a member of the family. If the driver is not a member of the family and liability is claimed on an agency basis, the appropriate agency instructions should be used from WPI Chapter 50 (Agency and Partnership—Torts).

For a caution about the instruction's bracketed word "maintains," see the Comment.

COMMENT

In general. The family car doctrine has been recognized in a long line of cases commencing with *Birch v. Abercrombie*, 74 Wash. 486, 133 P. 1020 (1913), modified, 135 P. 821 (1913). Liability under the doctrine is incurred (1) when the vehicle is owned, provided, or maintained by a parent, (2) for the general use, pleasure, and convenience of family members, (3) and at the time of the accident the vehicle is being driven by a member of the family for whom the vehicle is maintained, (4) with the express or implied consent of the parent. *Watson v. Emard*, 165 Wn.App. 691, 267 P.3d 1048 (2011); *Cameron v. Downs*, 32 Wn.App. 875, 650 P.2d 260 (1982).

Agency principles. The family car doctrine is based on the theory of agency, and agency principles are often applied in resolving issues arising under the doctrine. Thus, a family member will be treated as an agent of a parent as long as the vehicle was being used in furtherance of a family purpose for which it is maintained. *Schnebly v. Bryson*, 158 Wash. 250, 290 P. 849 (1930); *Kaynor v. Farline*, 117 Wn.App. 575, 72 P.3d 262 (2003). Similarly, deviations from the scope of consent or use of the vehicle in a forbidden manner at the time of the accident are treated in the same fashion as a servant's deviation from the scope of employ-

ment under respondeat superior. See *King v. Cann*, 184 Wash. 554, 52 P.2d 900 (1935); *Grange Ins. Ass'n v. Ochoa*, 39 Wn.App. 90, 691 P.2d 248 (1984).

Liability under the doctrine may be incurred for damages caused by a third person to whom a family member has entrusted the vehicle, if the entrustment was within the family member's scope of agency. *Cameron*, 32 Wn.App. 875. There may also be related situations of actual agency that reach the same practical result. For example, an outsider to the family may be an actual agent if that person drives the family vehicle on an errand for a member of the family. See *Davis v. Browne*, 20 Wn.2d 219, 147 P.2d 263 (1944); *Warren v. Norguard*, 103 Wash. 284, 174 P. 7 (1918). In such a case, instructions on the theory of agency may be appropriate. See WPI Chapter 50 (Agency and Partnership—Torts).

Ownership not required. Actual ownership of the vehicle is not essential for the doctrine to apply. A showing that the vehicle was provided or maintained by a parent for family use will suffice to invoke the doctrine. *Jerdal v. Sinclair*, 54 Wn.2d 565, 342 P.2d 585 (1959). However, mere paper title showing ownership of the vehicle is not enough to make the doctrine applicable if it is shown that the driver was the real owner of the vehicle and had exclusive control and use of it. *Foran v. Kallio*, 56 Wn.2d 769, 355 P.2d 544 (1960) (vehicle purchased with and maintained by the earnings of a partially emancipated youth was not a family vehicle for purposes of the family car doctrine); *Mylnar v. Hall*, 55 Wn.2d 739, 350 P.2d 440 (1960).

The test for ownership of the vehicle was established in *Jerdal v. Sinclair*, 54 Wn.2d 565, 569, 342 P.2d 585 (1959):

- (a) Who paid for the car.
- (b) Who had the right to control the use of the car.
- (c) The intent of the parties who bought and sold the car.
- (d) The intent of the parents and the child as to who, between them, was the owner of the car.
- (e) To whom did the seller make delivery of the car.
- (f) Who exercised property rights in the car from the date of its purchase to the date of the accident.
- (g) Any other evidence which has been presented which bears on who is the owner in fact.

See also *Coffman v. McFadden*, 68 Wn.2d 954, 958, 416 P.2d 99 (1966).

“Maintains.” As indicated above, the doctrine applies when a person “maintains a motor vehicle” for a family member’s use. The WPI Committee found no cases that clearly define “maintains” for purposes of the Family Car Doctrine. The WPI Committee found no cases that suggest that “maintains” means maintenance such as oil changes and the like.

Bicycles. The Washington Supreme Court declined to extend the doctrine to bicycles. *Pflugmacher v. Thomas*, 34 Wn.2d 687, 209 P.2d 443 (1949).

[Current as of March 2021.]

CHAPTER 73

MOTOR VEHICLES—RAILROAD CROSSINGS

(No instructions are set forth.)

The WPI Committee has withdrawn the instructions that formerly appeared in this chapter because the Federal Railroad Safety Act preempts state statutes in some circumstances. See 49 U.S.C. § 20106; *Norfolk S. R.R. Co. v. Shanklin*, 529 U.S. 344, 120 S.Ct. 1467, 146 L.Ed.2d 374 (2000). The federal circuits are not uniform on the issue of preemption. See extensive discussion at *Lee v. Burlington N. Santa Fe Ry. Co.*, 245 F.3d 1102 (9th Cir. 2001).

Practitioners may find state statutes addressing the operation of railroads at RCW 46.61.340, RCW 46.61.345, RCW Chapter 81.48, RCW Chapter 81.53, and RCW 35.22.280(9). Administrative regulations concerning the operations of railroad crossings are contained in WAC Chapter 480-60 and WAC Chapter 480-62.

General principles of negligence apply in railroad crossing cases unless the injured party is an employee of the railroad. A railroad employee is protected by the Federal Employers' Liability Act, 45 U.S.C. §§ 51–60, which preempts state law. *Seeberger v. Burlington N. R.R. Co.*, 138 Wn.2d 815, 982 P.2d 1149 (1999) (thorough discussion of the lesser standard of negligence required to take a FELA case to jury). But see *Noice v. BNSF Ry.*, 383 P.3d 761 (N.M. 2016); *Fair v. BNSF Ry.*, 238 Cal.App.4th 269, 189 Cal.Rptr.3d 150 (2015).

[Current as of March 2021.]

PART IX

**PARTICULARIZED STANDARDS OF
CONDUCT**

CHAPTER 100

COMMON CARRIERS

- WPI 100.01 Common Carrier—Duty to Passengers
- WPI 100.02 Common Carrier—Definition
- WPI 100.03 Common Carrier—Duty to Protect Passengers From
Misconduct of Others
- WPI 100.04 Common Carrier—Duty to Protect Passengers From
Assault or Intentional Harm by Employees
- WPI 100.07 Conduct of Passengers—Right of Carrier to Eject
- WPI 100.08 Common Carrier—Duty to Disabled, Infirm, or
Intoxicated Passenger or to a Child
- WPI 100.09 Passenger—Definition—When Status Begins and
Terminates
- WPI 100.12 Common Carriers—Duty to Protect Invitees From
Assault
- WPI 100.14 Facilities for Prospective Passengers
- WPI 100.15 Place to Board and Alight—Passengers

WPI 100.01

COMMON CARRIER—DUTY TO PASSENGERS

[At the time of the occurrence in question, the (insert
name of party) was a common carrier.]

A common carrier has a duty to its passengers to exercise the highest degree of care consistent with the practical operation of its type of transportation and its business as a common carrier. Any failure of a common carrier to exercise such care is negligence.

[However, a common carrier is not a guarantor of the safety of its passengers.]

NOTE ON USE

Use the first bracketed paragraph only if there is no disputed factual issue as to whether the defendant is a common carrier. If there is a factual issue whether the defendant comes within the legal definition of common carrier, the jury must be given an instruction defining common carrier. See Comment to WPI 100.02 (Common Carrier—Definition).

Use this instruction whether the allegations of negligence relate to the operation of the vehicle or its construction or maintenance. Use this instruction whether the carrier-passenger relationship has been established or is an issue for the jury.

Do not use the bracketed last paragraph unless the circumstances of the particular case call for a negative warning to the jury.

Do not use WPI 10.01 (Negligence—Adult—Definition) with this instruction unless the case involves multiple defendants, some of whom are not common carriers, or unless there is a factual issue as to the defendant's status as a common carrier. If WPI 10.01 (Negligence—Adult—Definition) is given, care must be taken to insure that the jury understands which standard of care the jury should apply to each defendant.

Use WPI 100.09 (Passenger—Definition—When Status Begins and Terminates) if the carrier-passenger relationship is an issue for the jury.

Use WPI 100.04 (Common Carrier—Duty to Protect Passengers from Assault or Intentional Harm by Employees) for intentional torts by employees of the carrier.

COMMENT

The duty of a common carrier to safeguard passengers from injury requires the carrier to exercise the highest degree of care consistent with the practical operation of its business or its type of transportation. See, e.g., *Price v. Kitsap Transit*, 125 Wn.2d 456, 465, 886 P.2d 556 (1994); *Parrilla v. King Cnty.*, 138 Wn.App. 427, 442, 157 P.3d 879 (2007) (“a common carrier of passengers owes the highest degree of care to protect its passengers from harm”). The duty is non-delegable to an agent, such as a contracted repair company. *Knutson v. Macy's West*

Stores Inc., 1 Wn.App.2d 543, 546–47, 406 P.3d 683 (2017) (citing Restatement (Second) of Agency § 214 and comment “a” thereto with approval).

A common carrier is not an insurer of its passengers’ safety. *Walker v. King Cnty. Metro*, 126 Wn.App. 904, 908, 109 P.3d 836 (2005); *Tortes v. King Cnty.*, 119 Wn.App. 1, 7–8, 84 P.3d 252 (2003). The mere fact that there was an accident or injury to a passenger is not sufficient to raise a presumption that the carrier was negligent. *Kaiser v. Suburban Transp. Sys.*, 65 Wn.2d 461, 398 P.2d 14 (1965), amended 65 Wn. 2d 461, 401 P.2d 350 (1965); *Tortes*, 119 Wn.App. at 7–8. “A carrier is not liable for injuries resulting from ordinary jolts and jerks, necessarily incident to the mode of transportation, which are not the result of negligence.” *Gentry v. Greyhound Corp.*, 46 Wn.2d 631, 633, 283 P.2d 979 (1955); *Walker*, 126 Wn.App. at 908.

A carrier’s “highest degree of care” is owed only to its passengers, not to third parties, such as other motorists. *Parrilla*, 138 Wn.App. at 442. The heightened standard is of no avail to a motorist whose car collides with a bus. *Parrilla*, 138 Wn.App. at 442–43.

The duty owed by a common carrier to a prospective passenger who has not attained passenger status is the duty of ordinary care. *Evans v. Yakima Valley Transp. Co.*, 39 Wn.2d 841, 239 P.2d 336 (1952). For a discussion of whether a plaintiff qualifies as a passenger, see the Comment to WPI 100.09 (Passenger—Definition—When Status Begins and Terminates).

Elevators and escalator owners and operators are common carriers in Washington. *Dabroe v. Rhodes Co.*, 64 Wn.2d 431, 392 P.2d 317 (1964); *Pruneda v. Otis Elevator Co.*, 65 Wn.App. 481, 828 P.2d 642 (1992); see WPI 100.02 (Common Carrier—Definition). In cases involving elevators and escalators operated for public use, the court may wish to modify the instruction to identify the type or nature of the defendant’s common carrier activities. This may be done by modifying the second sentence of the instruction to read: “. . . consistent with the practical operation of its elevators and its business as a common carrier by elevator.”

In *Yurkovich v. Rose*, 68 Wn.App. 643, 847 P.2d 925 (1993), the court held that there was no need for the trial court to instruct the jury that a common carrier is not a guarantor of the plaintiff’s safety under the facts of the case. The court found that the instructions as a whole adequately conveyed the same message and permitted the defendants to argue their theory of the case.

It is reversible error to give WPI 10.01 (Negligence—Adult—Definition) without explaining the application of each “duty of care” instruc-

tion to the jury. *Coyle v. Mun. of Metro. Seattle*, 32 Wn.App. 741, 649 P.2d 652 (1982). This holding would also seem to apply if there are multiple defendants, all of whom are not conceded to be common carriers.

In *Quynn v. Bellevue School District*, 195 Wn.App. 627, 383 P.3d 1053 (2016), the court discussed the applicable duty of care when a school district acts as a common carrier to its students. The court stated that when a school district acts as a common carrier “it may also owe them the duty that arises from the carrier-passenger relationship.” *Quynn*, 195 Wn.App. at 634. However, a school district’s failure to protect a student from harassment and bullying on a school bus does not implicate the high standard of care attached to operation of a common carrier because the alleged breach of duty is not connected to the operation of the school bus. Instead, the applicable standard of care is the duty imposed on school districts to protect their students from physical harm caused by third parties as set forth in *McLeod v. Grant County School District No. 128*, 42 Wn.2d 316, 255 P.2d 360 (1953), and its progeny.

For a general discussion of this area of the law, see *DeWolf & Allen*, 16 Washington Practice, Tort Law & Practice §§ 2:38–.40 (5th ed.).

[Current as of February 2021.]

WPI 100.02

COMMON CARRIER—DEFINITION

(No special instruction is set forth.)

COMMENT

Washington has adopted a three-part test to determine whether a party is a common carrier:

(1) The carriage must be part of the business; (2) the carriage must be for hire or remuneration; and (3) the carrier must represent to the general public that this service is part of the particular business in which he is engaged, and that he is willing to serve the public in that business.

McDonald v. Irby, 74 Wn.2d 431, 435, 445 P.2d 192 (1968); see also RCW 81.04.010(11) (definition of “common carrier” for purposes of regulation by the Utilities and Transportation Commission); RCW 47.60.220 (Washington state ferries).

In the vast majority of cases, the court will determine whether the party in question is a common carrier as a matter of law. See, e.g., McDonald, 74 Wn.2d at 435; Donato v. United Grain Corp., 18 Wn.App. 880, 573 P.2d 811 (1977). If a party’s status as a common carrier cannot be determined as a matter of law, an instruction based on the three-part test discussed above and tailored to the particular facts of the case will need to be given. Due to the fact-specific nature of the instruction, and because these issues are usually resolved as a matter of law, the WPI Committee has not set forth a pattern instruction on this subject.

Although the owners or operators of elevators or escalators operated for public use do not strictly meet the definition of common carrier set forth above, they are considered to be common carriers. Dabroe v. Rhodes, 64 Wn.2d 431, 392 P.2d 317 (1964) (department store escalator); Shielee v. Hill, 47 Wn.2d 362, 287 P.2d 479 (1955) (hotel elevator); Tinder v. Nordstrom, Inc., 84 Wn.App. 787, 929 P.2d 1209 (1997) (department store escalator); Houck v. Univ. of Wash., 60 Wn.App. 189, 803 P.2d 47 (1991) (public university elevator); Brown v. Crescent Stores, 54 Wn.App. 861, 776 P.2d 705 (1989) (store elevator).

In contrast, companies that simply have contracts to maintain and repair elevators are not common carriers. Kimball v. Otis Elevator Co., 89 Wn.App. 169, 947 P.2d 1275 (1997); Murphy v. Montgomery Elevator Co., 65 Wn.App. 112, 117, 828 P.2d 584 (1992); Pruneda v. Otis Elevator Co., 65 Wn.App. 481, 828 P.2d 642 (1992).

[Current as of February 2021.]

WPI 100.03

**COMMON CARRIER—DUTY TO PROTECT
PASSENGERS FROM MISCONDUCT OF OTHERS**

The duty of a common carrier includes a duty to protect its passengers from harm resulting from the misconduct of others, when such conduct is known or could reasonably be foreseen and prevented by the exercise of the care required of a common carrier.

NOTE ON USE

Use WPI 100.01 (Common Carrier—Duty to Passengers) with this instruction.

Use WPI 100.04 (Common Carrier—Duty to Protect Passengers From Assault or Intentional Harm By Employees) instead of this instruction for cases involving assaults or other intentional harm by the common carrier's employees.

Use WPI 120.06.03 (Duty to Business Invitee—Protection From Criminal Acts) instead of this instruction when the injured person is a business invitee rather than a passenger. See also the discussion in the Comment to WPI 100.12 (Common Carriers—Duty to Protect Invitees from Assault).

COMMENT

A carrier is bound to exercise the highest degree of care demanded by the surrounding circumstances in protecting its passengers from misconduct of fellow passengers, when such conduct is known or could reasonably be anticipated in the exercise of the highest degree of care. *Anderson v. N. Pac. Ry. Co.*, 88 Wash. 139, 152 P. 1001 (1915); *Kelly v. Navy Yard Route*, 77 Wash. 148, 137 P. 444 (1913).

A carrier has a duty to protect passengers from another passenger's criminal acts or intentional misconduct, but only to the extent that the acts or misconduct are foreseeable. *Tortes v. King Cnty.*, 119 Wn.App. 1, 6, 7–8, 84 P.3d 252 (2003).

Although *Tortes* involved a criminal act committed by another passenger, the court's analysis extended the carrier's duty to protect against criminal acts of non-passenger third parties. "Metro has the duty to guard against foreseeable third party actions." *Tortes*, 119 Wn.App. at 8.

The extension of this principle is also supported by several cases that do not involve common carriers but involve other special relationships that trigger a duty to protect a person from another's criminal acts. See *Niece v. Elmview Grp. Home*, 131 Wn.2d 39, 929 P.2d 420 (1997); *Hutchins v. 1001 Fourth Ave. Assoc.*, 116 Wn.2d 217, 802 P.2d 1360 (1991); *Lauritzen v. Lauritzen*, 74 Wn.App. 432, 874 P.2d 861 (1994); see also the Comment to WPI 120.06.03 (Duty to Business Invitee—Protection from Criminal Acts). The instruction is written accordingly.

The common carrier's heightened duty of protection applies only to its passengers, not to third parties. See *Parrilla v. King Cnty.*, 138 Wn.App. 427, 442, 157 P.3d 879 (2007).

In *Quynn v. Bellevue School District*, 195 Wn.App. 627, 383 P.3d 1053 (2016), the court held that a school district's failure to protect a student from harassment and bullying on a school bus does not implicate the high standard of care attached to operation of a common carrier because the alleged breach of duty is not connected to the operation of the school bus. Instead, the applicable standard of care is the duty imposed on school districts to protect their students from physical harm caused by third parties as set forth in *McLeod v. Grant County School District No. 128*, 42 Wn.2d 316, 255 P.2d 360 (1953), and its progeny. See also *Hendrickson v. Moses Lake Sch. Dist.*, 192 Wn.2d 269, 428 P.3d 1197 (2018).

[Current as of February 2021.]

WPI 100.04

**COMMON CARRIER—DUTY TO PROTECT
PASSENGERS FROM ASSAULT OR INTENTIONAL
HARM BY EMPLOYEES**

A common carrier is liable for any injury proximately caused to its passengers by any [assault upon] [intentional harm to] them by an employee of the carrier [then on duty].

NOTE ON USE

Use this instruction if there is a dispute of fact as to whether there was an intentional unlawful act or assault by an employee or whether the employee was on duty. If there is no such issue, there will be a directed verdict on liability and this instruction is not needed. Do not use WPI 100.01 (Common Carrier—Duty to Passengers) for an intentional tort. Use bracketed material as applicable.

COMMENT

Finding it “well nigh universal,” the Washington Supreme Court held that a passenger on a common carrier is entitled to absolute protection from assaults by employees, and the carrier cannot plead that an employee acted outside the scope of employment. *Marks v. Alaska S.S. Co.*, 71 Wash. 167, 127 P. 1101 (1912). Accord, *Morton v. De Oliveira*, 984 F.2d 289, 290 (9th Cir.1993) (detailed discussion of *Marks* and related cases).

[Current as of February 2021.]

WPI 100.07

**CONDUCT OF PASSENGERS—RIGHT OF CARRIER
TO EJECT**

Passengers riding on a common carrier must conform their conduct to the ordinary and usual standards of passengers and to the carrier's reasonable rules and regulations.

The failure or refusal of a passenger to comply or to conform to such standards, or to such rules and regulations of which the passenger knew or reasonably should have known, gives the carrier [or a person assisting an agent of the carrier] the right to use such force as is reasonably necessary to put the passenger off of the vehicle taking into account the passenger's personal safety [so long as the vehicle has first been stopped].

[However, if you find that the carrier's employees were not justified in ejecting the plaintiff passenger, or that they used more force than was reasonably necessary, then the carrier is liable for such of plaintiff's damages as were proximately caused by such acts.]

NOTE ON USE

Use bracketed material as applicable. Use the bracketed third paragraph when there is an issue on the justification of the ejection or the use of excessive force by the carrier's employee.

COMMENT

When the conduct or condition of a passenger makes it probable that there will be discomfort or annoyance to other passengers, it is the right and duty of a carrier's employees to remove such passenger. *Backlund v. Puget Sound Traction, Light & Power Co.*, 86 Wash. 257, 150 P. 3 (1915). Cases from other jurisdictions hold that ejection may be based on disorderly, obscene, or dangerous conduct or on conduct resulting in discomfort or annoyance of other passengers. See 14 Am.Jur.2d Carriers §§ 1018, 1031, 1033 (2020). The WPI Committee has long used the phrase "ordinary and usual standards of passengers" in the instruction to address these circumstances.

RCW 9A.16.020(5) provides in part that the use of force by an employee or agent of a common carrier is lawful when used to expel a passenger “who refuses to obey a lawful and reasonable regulation prescribed for the conduct of passengers.” Under the statute, the force must be reasonable, taking into account the condition of the passenger who is being ejected, and the vehicle must be stopped before the passenger is expelled.

“Vehicle,” for purposes of RCW 9A.16.020(5), “means a ‘motor vehicle’ as defined in the vehicle and traffic laws, any aircraft, or any vessel equipped for propulsion by mechanical means or by sail.” RCW 9A.04.110(29). Depending on the fact questions at issue, see WPIC 98.01 (Traffic Cases—Vehicle—Definition) and WPIC 98.02 (Traffic Cases—Motor Vehicle—Definition) as an aid to drafting an instruction if that would be helpful.

[Current as of February 2021.]

WPI 100.08

**COMMON CARRIER—DUTY TO DISABLED,
INFIRM, OR INTOXICATED PASSENGER OR TO A
CHILD**

When a carrier is aware that a passenger is [mentally or physically disabled] [frail or infirm] [intoxicated] [a child traveling alone] so that the hazards of travel are increased as to that passenger, it is the duty of the carrier to provide that amount of additional care which is reasonably required under the circumstances consistent with the practical operation of its type of transportation and its business as a common carrier.

[A carrier has a right to assume sobriety and sanity until it has actual knowledge to the contrary.] [The carrier has the duty to use ordinary care in discovering physical disability or infirmity.]

NOTE ON USE

Use bracketed material in the first paragraph as applicable. All or any part of the second paragraph contained in brackets should be used only when there is an issue as to notice to the carrier. If the last bracketed part of the second paragraph is used, a definition of ordinary care should also be given. See WPI 10.02 (Ordinary Care—Adult—Definition).

In certain instances this instruction may require modification if a child is traveling with a parent or another adult who is supervising the child. See the discussion in the Comment below.

COMMENT

The care to be exercised by a carrier in determining the infirmities of passengers is ordinary care. *Gray v. City of Seattle*, 29 Wn.2d 428, 187 P.2d 310 (1947). Once a carrier accepts or becomes aware of a passenger with an infirm condition, the carrier must exercise such special care and assistance as is required to safely transport that passenger. See *Fagerdahl v. N. Coast Transp. Co.*, 178 Wash. 482, 35 P.2d 46 (1934) (duty commensurate with the apparent condition of the passenger); *Benson v. Tacoma Ry. & Power Co.*, 51 Wash. 216, 98 P. 605 (1908) (pas-

senger so intoxicated as to be unable to take care of himself); *Sullivan v. Seattle Elec. Co.*, 51 Wash. 71, 97 P. 1109 (1908) (apparent feeble health needing assistance).

The duty of care ends when the passenger disembarks unless the carrier's employees have actual knowledge of the passenger's incapacity and a particular risk of harm which may result. See e.g. *Shelley v. United Air Lines*, 84 Wn.App. 129, 925 P.2d 991 (1996); see also Comment to WPI 100.09 (Passenger—Definition—When Status Begins and Terminates).

When a child travels with a parent or another adult who is supervising the child, the primary duty of caring for the child is on the parent or the child's supervisor. The carrier has the right to presume that the parent or supervisor will take care of the child as required under the circumstances. If the carrier's employees know, or should know, that the child is or will be exposed to danger or injuries by acts or negligence of the carrier's employees, the carrier is under the duty to use all reasonable and practicable care and diligence to avoid the danger and avert the injury. *Shay v. Parkhurst*, 38 Wn.2d 341, 229 P.2d 510 (1951).

In *Houck v. University of Washington*, 60 Wn.App. 189, 803 P.2d 47 (1991), the plaintiff became intoxicated at a dormitory party and subsequently fell down an elevator shaft in the dormitory while attempting to jump from the elevator after students had stalled it between floors. The trial court instructed that a common carrier who is not otherwise negligent has no duty to protect intoxicated passengers from damages caused by their intoxication unless the common carrier has actual knowledge of their intoxication and their danger. The Court of Appeals held that the instruction was reversible error under the facts of the case because it removed the question of negligence from the jury and was tantamount to a directed verdict for the defense. The court stated that an actual knowledge requirement may be understandable in a situation involving attended common carrier facilities, but it cannot apply to unattended, self-service facilities.

For additional discussion, see DeWolf & Allen, 16 Washington Practice, Tort Law & Practice § 2.40 (5th ed.).

[Current as of March 2021.]

WPI 100.09

**PASSENGER—DEFINITION—WHEN STATUS
BEGINS AND TERMINATES**

A person is a passenger if he or she is in the act of boarding, entering, riding upon, or alighting from the carrier's conveyance with the actual or implied consent of the carrier. [Also, one is a passenger while upon the carrier's premises for a reasonable time after having disembarked from the carrier's conveyance, or for a reasonable time before the departure of the carrier's conveyance upon which he or she intends to ride as a passenger.]

NOTE ON USE

Use this instruction if there is a factual issue whether a person is a passenger. See discussion in the Comment below.

Use bracketed material as applicable. If plaintiff's status as passenger has terminated, use appropriate instructions from WPI Chapter 120 (Trespasser—Licensee—Social Guest—Invitee). If such status is in issue, use this instruction together with appropriate instructions from WPI Chapter 120 (Trespasser—Licensee—Social Guest—Invitee).

COMMENT

This instruction was approved in *Houck v. University of Washington*, 60 Wn.App. 189, 201, 803 P.2d 47 (1991).

The court looks at the following factors in determining whether a plaintiff has the status of a "passenger:"

- (1) place (a place under the control of the carrier and provided for the use of persons who are about to enter carrier's conveyance);
- (2) time (a reasonable time before the time to enter the conveyance);
- (3) intention (a genuine intention to take passage upon carrier's conveyance);
- (4) control (a submission to the directions, express or implied, of the carrier); and

- (5) knowledge (a notice to carrier either that the person is actually prepared to take passage or that persons awaiting passage may reasonably be expected at the time and place).

Zorotovich v. Wash. Toll Bridge Auth., 80 Wn.2d 106, 108–09, 491 P.2d 1295 (1971).

A carrier owes a prospective passenger who has not attained passenger status the duty to exercise ordinary care. A person who is transferring between carriers is owed only ordinary care. *Evans v. Yakima Valley Transp. Co.*, 39 Wn.2d 841, 239 P.2d 336 (1952); *Hart v. King Cnty.*, 104 Wash. 485, 177 P. 344 (1918); *Sweek v. Mun. of Metro. Seattle*, 45 Wn.App. 479, 726 P.2d 37 (1986); see also *Burgdorf v. State*, 61 Wn.App. 918, 812 P.2d 890 (1991) (ferry terminal lobby is open to the public for multiple purposes; without other evidence of passenger status, only ordinary care applies).

However, a prospective passenger who is at a place that is under the sole control of the carrier, such as a train depot or boat dock, may be deemed a passenger. In *Zorotovich*, the court held that a pedestrian in the process of purchasing a ferry ticket who is injured while at the ticket booth is a passenger for purposes of the common carrier doctrine. *Accord, Whitlock v. N. Pac. Ry. Co.*, 59 Wash. 15, 109 P. 188 (1910).

In the absence of any danger, defect, or obstruction in the place of alighting, the relation of passenger and carrier terminates when the passenger gains a secure and maintainable footing on the street. *Peterson v. City of Seattle*, 51 Wn.2d 187, 316 P.2d 904 (1957); *Welsh v. Spokane & I.E.R. Co.*, 91 Wash. 260, 157 P. 679 (1916); *Shelley v. United Air Lines*, 84 Wn.App. 129, 133, 925 P.2d 991 (1996).

A common carrier's duty of care may be owed to a disabled or incapacitated person who has in fact left the carrier. To impose liability for injuries sustained by an intoxicated passenger after leaving the carrier, the plaintiff must establish that the carrier had both actual knowledge of the plaintiff's incapacity and actual knowledge that the plaintiff placed himself or herself in a dangerous position. *Shelley*, 84 Wn.App. 129; *Torres v. Salty Sea Days, Inc.*, 36 Wn.App. 668, 676 P.2d 512 (1984).

A person who remained on a boat for an extended time after arriving at the passenger's destination was held to be no longer a passenger. *Duval v. Inland Nav. Co.*, 90 Wash. 149, 155 P. 768 (1916).

The issues underlying this instruction are also discussed in *DeWolf & Allen*, 16 Washington Practice, Tort Law & Practice § 2.39 (5th ed.).

[Current as of March 2021.]

WPI 100.12**COMMON CARRIERS—DUTY TO PROTECT
INVITEES FROM ASSAULT**

(No instruction is set forth.)

COMMENT

The prior instruction addressed a common carrier's duty to exercise ordinary care to protect non-passenger invitees from assaults by third parties. The instruction was withdrawn because it is no longer needed. A carrier's duty to protect non-passenger invitees from criminal harm is the same as the duty that any business has to protect its invitees from criminal harm. Accordingly, the applicable instruction in these circumstances is WPI 120.06.03 (Duty to Business Invitee—Protection from Criminal Acts), which applies broadly to all businesses.

On the other hand, if the injured person was a passenger, the applicable instruction is WPI 100.03 (Common Carrier—Duty to Protect Passengers From Misconduct of Others).

[Current as of February 2021.]

WPI 100.14

FACILITIES FOR PROSPECTIVE PASSENGERS

(No instruction is set forth.)

COMMENT

The former instruction addressed the standard of ordinary care that common carriers owe to non-passengers using their facilities. This is the same duty of care that businesses generally owe with respect to activities or conditions on their premises. Accordingly, for cases involving non-passengers on the premises of common carriers, practitioners should refer to the general instruction WPI 120.06.01 (Duty of Business Proprietor to Customer—Activities or Condition of Premises). For cases involving passengers, practitioners should instead refer to the heightened standard of care for common carriers found in WPI 100.01 (Common Carrier—Duty to Passengers).

[Current as of February 2021.]

WPI 100.15

PLACE TO BOARD AND ALIGHT—PASSENGERS

In selecting a place for a passenger to [board] [alight from] its [vehicles] [(fill in type of vehicle)], a common carrier owes to its passengers the duty to exercise the highest degree of care consistent with the type of transportation used and the practical operation of its business as a common carrier.

NOTE ON USE

Use bracketed material as applicable. Fill in the blank with the words “train” or “bus,” etc., when that would be helpful.

COMMENT

A common carrier must use the highest degree of care to select a safe place to stop its vehicles, whether the usual stopping place or not, if it is one at which a passenger is expressly or impliedly invited to alight. *Benjamin v. City of Seattle*, 74 Wn.2d 832, 447 P.2d 172 (1968); see also *Yurkovich v. Rose*, 68 Wn.App. 643, 847 P.2d 925 (1993) (the driver of a school bus has a duty to students higher than that of a common carrier).

[Current as of February 2021.]

CHAPTER 110

PRODUCT LIABILITY

- WPI 110.00 Introduction
- WPI 110.01 Manufacturer's Duty—Defect in Construction
- WPI 110.01.01 Manufacturer's Duty—Express Warranties
- WPI 110.02 Manufacturer's Duty—Design
- WPI 110.02.01 Manufacturer's Duty—Design—Unavoidably Unsafe Products—Negligence—Comment K
- WPI 110.02.02 Crashworthiness / Enhanced Damage and Injury—Manufacturing and/Or Design Defect
- WPI 110.02.03 Crashworthiness / Enhanced Damage and Injury—Manufacturing and/Or Design Defect—Burden of Proof—Allocation of Fault
- WPI 110.02.04 Crashworthiness / Enhanced Damage and Injury—Manufacturing and/Or Design Defect—Verdict Form for Use With WPI 110.30.01, 110.30.02, 110.31.01, and 110.31.02
- WPI 110.03 Manufacturer's Duty to Provide Warnings or Instructions With Product
- WPI 110.03.01 Manufacturer's Duty to Provide Warnings or Instructions After the Product Was Manufactured
- WPI 110.04 Seller—Manufacturer—Defined
- WPI 110.05 Government Contract Specification—Defense
- WPI 110.06 Government Specifications—Noncompliance
- WPI 110.07 Seller Other Than a Manufacturer
- WPI 110.08 Useful Safe Life
- WPI 110.10 Assumption of Risk—Contributory Negligence
- WPI 110.23 Burden of Proof—Design—Assumption of Risk or Contributory Negligence
- WPI 110.30.01 Special Verdict Form—Product Liability—No Affirmative Defenses—No Empty Chairs
- WPI 110.30.02 Special Verdict Form—Product Liability—No Affirmative Defenses—Empty Chairs
- WPI 110.31.01 Special Verdict Form—Product Liability—Assumption of Risk—Contributory Negligence—No Empty Chairs
- WPI 110.31.01.01 Special Verdict Form—Product Liability—Assumption of Risk—Contributory Negligence—No Empty Chairs—Mixed Standards of Care
- WPI 110.31.01.02 Fault to Be Apportioned—Product Liability

WPI 110.00

INTRODUCTION

Background. The Washington Product Liability Act of 1981 (WPLA), RCW Chapter 7.72, was designed to simplify the adjudication of product liability claims, since the statutory cause of action subsumes all other causes of action “based on any other substantive legal theory except fraud, intentionally caused harm or a claim or action under the consumer protection act.” RCW 7.72.010(4). However, because there are claims that arose prior to the adoption of the WPLA, and because the WPLA has been interpreted to retain many of the features of the pre-WPLA common law approach to product liability, close attention should be paid to the relationship between the WPLA and the Tort Reform Act of 1981 (Chapter 4.22 RCW) concerning the allocation of fault.

Scope of the WPLA. Despite the intent to unify the treatment of all product liability claims, some types of claims are not covered by the WPLA. For example, human tissue, organs, blood, and its components are excluded. RCW 7.72.010(3); *Howell v. Spokane & Inland Empire Blood Bank*, 114 Wn.2d 42, 51–52, 785 P.2d 815 (1990). For a detailed analysis of the scope of the WPLA, see DeWolf & Allen, 16 Washington Practice, Tort Law & Practice § 17.4 (5th ed.).

Allocating fault. Product liability claims are often combined with claims against other defendants and fault on the part of the plaintiff may also be alleged. As a result, the jury instructions will often need to explain precisely how percentages of fault should be assigned to different “entities,” as defined by the statute, which may include not only parties to the lawsuit but other entities as well. Jury instructions should be carefully tailored to insure consistency with the verdict forms. See generally *Coulter v. Asten Grp., Inc.*, 135 Wn.App. 613, 146 P.3d 444 (2006); *Lundberg v. All-Pure Chem. Co.*, 55 Wn.App. 181, 777 P.2d 15 (1989).

Suggested considerations. With continuous improvement in mind, the WPI Committee suggests the following considerations for product liability causes of action:

- (1) **Precise wording.** The court’s instructions to the jury must

be worded precisely, so that the jury will understand how to apportion “fault” under RCW 4.22.015 and 4.22.070, among parties (other than intentional tortfeasors). See WPI 110.31.01 (Special Verdict Form—Product Liability—Assumption of Risk—Contributory Negligence—No Empty Chairs), Question 6; WPI 110.31.02 (Special Verdict Form—Product Liability—Assumption of Risk—Contributory Negligence—Empty Chairs), Questions 8 and 9.

(2) Pre-WPLA claims. Some product liability claims (particularly those involving asbestos exposure) are governed by pre-WPLA law. Consequently, instructions in this chapter will need to be modified if the action arose before July 26, 1981. For pattern instructions applying to pre-WPLA product liability actions, see the second edition of this volume. RCW 7.72.020(1) provides that pre-existing law is modified only to the extent set forth in the act. Accordingly, this chapter’s commentary includes references to pre-WPLA case law when relevant. See *Fagg v. Bartells Asbestos Settlement Trust*, 184 Wn.App. 804, 339 P.3d 207 (2014), for a comprehensive discussion concerning the applicability of the WPLA in a case where the plaintiff was exposed to asbestos over an extended period of time (pre and post WPLA), in a variety of settings and through several different mechanisms.

(3) Preemption. State product liability law is sometimes preempted by federal laws regulating particular products or activities. There is a presumption against federal preemption of state law. *Wyeth v. Levine*, 555 U.S. 555, 129 S. Ct. 1187, 173 L. Ed. 2d 51 (2009); *Hill v. Garda CL Nw., Inc.*, 191 Wn.2d 553, 424 P.3d 207 (2018) (claims for violation of Minimum Wage Act not preempted by Labor Management Relations Act). To determine whether state law is preempted by federal law, the court should consider: (1) the federal law and record of legislative and agency intent; (2) whether the federal record shows a balancing of interests, analysis of factors, and explanation of exactly how state tort claims interfere with implementation of federal law. Compare *Wyeth*, 555 U.S. 555, with *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000). Washington courts have found that certain federal statutes preempt state product liability claims, see, e.g., *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 896 P.2d 682 (1995) (federal law regulating pesticides); *Berger v. Personal Prods., Inc.*, 115 Wn.2d 267, 797 P.2d 1148 (1990) (FDA regulation on tampon labels regarding toxic shock syndrome); *Timberline Air Serv., Inc. v. Bell Helicopter-Textron, Inc.*, 125 Wn.2d 305, 884 P.2d 920 (1994) (federal common law regarding goods supplied to government by a government contractor).

(4) Punitive damages. Punitive damages are not permitted

under WPLA. Washington courts will apply the punitive damages law of other jurisdictions in product liability cases, if warranted under choice of law principles. In such a situation, the jury instructions on punitive damages should conform to the laws of the other state. *Singh v. Edwards Lifesciences Corp.*, 151 Wn.App. 137, 143–44, 210 P.3d 337 (2009). See also *Bryant v. Wyeth*, 879 F.Supp.2d 1214 (W.D. Wash. 2012), as to application of choice of law principles.

(5) Damages for Emotional Distress. These damages are recoverable by the direct purchaser of a contaminated food product, in the absence of physical injury, if the emotional distress is a reasonable response and manifests by objective symptomology. *Bylsma v. Burger King*, 176 Wn.2d 555, 293 P.3d 1168 (2013).

See generally DeWolf & Allen, 16 Washington Practice, Tort Law & Practice, Chapter 17 (5th ed.).

[Current as of January 2021.]

WPI 110.01**MANUFACTURER'S DUTY—DEFECT IN
CONSTRUCTION**

A manufacturer has a duty to supply products that are reasonably safe in construction.

There are two tests for determining whether a product is not reasonably safe in construction. The plaintiff may prove that the product was not reasonably safe in construction using either of these two tests.

The first test is whether, when the product left the control of the manufacturer, the product deviated in some material way from the design specifications or performance standards of the manufacturer, or deviated in some material way from otherwise identical units in the same product line.

The second test is whether the product is unsafe to an extent beyond that which would be contemplated by the ordinary user. In determining what an ordinary user would reasonably expect, you should consider the following:

- (1) the relative cost of the product;**
- (2) the seriousness of the potential harm from the claimed defect;**
- (3) the cost and feasibility of eliminating or minimizing the risk; and**
- (4) such [other] factors as the nature of the product and the claimed defect indicate are appropriate.**

If you find that the product was not reasonably safe in construction and this was a proximate cause of the

plaintiff's [injury] [and] [or] [damage], then the manufacturer is [subject to liability] [at fault].

NOTE ON USE

Use this instruction if there is a claim against a manufacturer that the product was not reasonably safe in construction. If only one of the two tests is being used, modify the instruction accordingly.

Use bracketed material as applicable. The bracketed "at fault" language is intended to be used in conjunction with WPI 110.31.01.02 (defining "fault") and with WPI 110.31.01.01 (the corresponding special verdict form) for cases involving mixed standards of care (e.g., negligence and strict liability); see the Notes on Use and Comments for WPI 110.31.01.01 (the corresponding special verdict form) and WPI 110.31.01.02 (defining "fault").

Use WPI 110.04 (Seller—Manufacturer—Defined) with this instruction.

Use either WPI 110.20 (Burden of Proof—Defect in Construction—No Affirmative Defense) or WPI 110.22 (Burden of Proof—Defect in Construction—Assumption of Risk or Contributory Negligence) with this instruction.

COMMENT

RCW 7.72.030(2).

The statute states in part that a "product manufacturer is subject to strict liability to a claimant if the claimant's harm was proximately caused by the fact that the product was not reasonably safe in construction."

The Washington Product Liability Act (WPLA) provides two different ways for plaintiffs to show that a product was defectively constructed. First, the plaintiff may show under RCW 7.72.030(2)(a) that "when the product left the control of the manufacturer, the product deviated in some material way from the design specifications or performance standards of the manufacturer, or deviated in some material way from otherwise identical units of the same product line." Second, the plaintiff may show under RCW 7.72.030(3) that the product "was unsafe to an extent beyond that which would be contemplated by the ordinary consumer."

Although Washington cases have not specifically held that the

consumer-expectations approach of RCW 7.72.030(3) is independent from the material-deviation approach of RCW 7.72.030(2)(a) in a defective construction case, the case law has held that the consumer-expectations approach is an independent alternative in two analogous contexts: design defects and inadequate warnings. See Comment to WPI 110.02 (Manufacturer's Duty—Design); Comment to WPI 110.03 (Manufacturer's Duty to Provide Warnings or Instructions with Product). The structure of the WPLA and the rationale in the case law implies the same result for construction defect cases. For this reason, the WPI Committee assumes that liability in a defective construction case can be predicated on either a material-deviation theory or a consumer-expectations theory, and that a plaintiff need not prove both theories in order to prevail.

Consumer expectations. The fourth paragraph of this instruction addresses the factors to be used in analyzing the consumer-expectations approach. The paragraph is taken from the statutory language, RCW 7.72.030(3), and derived from cases decided before the enactment of RCW 7.72.030. See *Ryder's Est. v. Kelly-Springfield Tire Co.*, 91 Wn.2d 111, 587 P.2d 160 (1978); *Seattle-First Nat'l Bank v. Tabert*, 86 Wn.2d 145, 542 P.2d 774 (1975); see also *Baughn v. Honda Motor Co.*, 107 Wn.2d 127, 727 P.2d 655 (1986). In *Tabert*, the court held:

In determining the reasonable expectations of the ordinary consumer, a number of factors must be considered. The relative cost of the product, the gravity of the potential harm from the claimed defect and the cost and feasibility of eliminating or minimizing the risk may be relevant in a particular case. In other instances the nature of the product or the nature of the claimed defect may make other factors relevant to the issue.

Tabert, 86 Wn.2d at 154.

The rule set forth in *Tabert* and other pre-WPLA cases that a manufacturer is strictly liable for a product that is unsafe to an extent beyond that which would be contemplated by an ordinary user does not appear to be modified by RCW 7.72.030(3). See *Couch v. Mine Safety Appliances Co.*, 107 Wn.2d 232, 239 n.5, 728 P.2d 585 (1986). RCW 7.72.030(3) provides that the trier of fact shall consider user expectations in determining whether a product is not reasonably safe.

Although RCW 7.72.030(3) does not use the word "reasonable," case law makes clear that the analysis is based on reasonable consumer expectations. See *Soproni v. Polygon Apartment Partners*, 137 Wn.2d 319, 327, 971 P.2d 500 (1999). Moreover, evidence of compliance with codes or standards is relevant, but not determinative, in analyzing rea-

sonable consumer expectations. Soproni, 137 Wn.2d at 328; Falk v. Keene Corp., 113 Wn.2d 645, 655, 782 P.2d 974 (1989); RCW 7.72.050 (1).

Unavoidably unsafe products. See the Comment to WPI 110.02.01 (Manufacturer's Duty—Design—Unavoidable Unsafe Products—Negligence—Comment *k*); Transue v. Aesthetech Corp., 341 F.3d 911 (9th Cir. 2003) (applying Washington law and holding that the proper legal standard was strict liability and not negligence for comment *k* cases in which there is an allegation of a production defect).

[Current as of December 2020.]

WPI 110.01.01

MANUFACTURER'S DUTY—EXPRESS WARRANTIES

A manufacturer has a duty to supply products that are reasonably safe. A product may be not reasonably safe because it does not conform to the manufacturer's express warranty.

A product is not reasonably safe because it did not conform to the manufacturer's express warranty, if:

- (1) the warranty is made part of the basis of the bargain;
- (2) the warranty relates to a material fact or facts concerning the product; and
- (3) the warranty turns out to be untrue.

If you find that the product was not reasonably safe because the product did not conform to the manufacturer's express warranty, and that this was a proximate cause of the plaintiff's [injury] [and] [or] [damage], then the manufacturer is [subject to liability] [at fault].

NOTE ON USE

Use this instruction if there is a claim against a manufacturer that the product was not reasonably safe because it did not conform to the manufacturer's express warranty.

Use bracketed material as applicable. The bracketed "at fault" language is intended to be used in conjunction with WPI 110.31.01.02 (defining "fault") and with WPI 110.31.01.01 (the corresponding special verdict form) for cases involving mixed standards of care (e.g., negligence and strict liability); see the Notes on Use and Comments for WPI 110.31.01.01 (the corresponding special verdict form) and WPI 110.31.01.02 (defining "fault").

Use WPI 110.04 (Seller—Manufacturer—Defined) with this instruction.

Along with this instruction, use either WPI 110.20 (Burden of

Proof—Defect in Construction—No Affirmative Defense) or WPI 110.22 (Burden of Proof—Defect in Construction—Assumption of Risk or Contributory Negligence).

COMMENT

RCW 7.72.030(2).

The statute states in part that a “product manufacturer is subject to strict liability to a claimant if the claimant’s harm was proximately caused by the fact that the product was . . . not reasonably safe because it did not conform to the manufacturer’s express warranty or to the implied warranties under Title 62A RCW.”

RCW 7.72.030(2)(b) provides that a “product does not conform to the express warranty of the manufacturer if it is made part of the basis of the bargain and relates to a material fact or facts concerning the product and the express warranty proved to be untrue.”

Express warranty. In the context of product liability, courts have generally used the term “express warranty” to refer to the public misrepresentation theory of liability. See Restatement (Second) of Torts § 402B cmt. d (1965). Under this theory, liability sounds in tort rather than contract and no privity is required. See *Baxter v. Ford Motor Co.*, 168 Wash. 456, 12 P.2d 409, 88 A.L.R. 521 (1932). By stating that the express warranty be “made part of the basis of the bargain,” it is not clear whether RCW 7.72.030(2)(b) now requires privity before an action based on express warranty may be brought.

RCW 7.72.030(3) provides that “[i]n determining whether a product was not reasonably safe under this section, the trier of fact shall consider whether the product was unsafe to an extent beyond that which would be contemplated by the ordinary consumer.” Although the statute’s use of the word “shall” appears to make application of the statute mandatory, the WPI Committee has not included the consumer expectations test as part of this instruction. The WPI Committee believes that the contemplations of the ordinary consumer as to the safety of a product have no relevance in determining whether the product conformed to the manufacturer’s express warranty.

Implied warranty. The pattern instruction will need to be modified for cases involving implied warranties. See Uniform Commercial Code, Title 62A RCW; *Gates v. Standard Brands, Inc.*, 43 Wn.App. 520, 719 P.2d 130 (1986).

Pre-WPLA law. For a background discussion of the theories of

misrepresentation and implied and express warranties under law predating the Washington Product Liability Act, see *Baughn v. Honda Motor Co.*, 107 Wn.2d 127, 151-52, 727 P.2d 655 (1986).

[Current as of December 2020.]

WPI 110.02**MANUFACTURER'S DUTY—DESIGN**

A manufacturer has a duty to design products that are reasonably safe as designed.

There are two tests for determining whether a product is not reasonably safe as designed. The plaintiff may prove that the product was not reasonably safe at the time it left the manufacturer's control using either of these two tests.

The first test is a balancing test. Under that test, you should determine whether, at the time the product was manufactured:

the likelihood that the product would cause injury or damage similar to that claimed by the plaintiff, and the seriousness of such injury or damage, was outweighed by the burden on the manufacturer to design a product that would have prevented the injury or damage, and the adverse effect that a practical and feasible alternative design would have on the usefulness of the product.

The second test is whether the product is unsafe to an extent beyond that which would be contemplated by the ordinary user. In determining what an ordinary user would reasonably expect, you should consider the following:

- (1) the relative cost of the product;**
- (2) the seriousness of the potential harm from the claimed defect;**
- (3) the cost and feasibility of eliminating or minimizing the risk; and**

- (4) such [other] factors as the nature of the product and the claimed defect indicate are appropriate.

[A product can be “not reasonably safe” even though the risk that it would cause the plaintiff’s harm or similar harms was not foreseeable by the manufacturer at the time the product left the manufacturer’s control.]

If you find that the product was not reasonably safe as designed at the time it left the manufacturer’s control and this was a proximate cause of the plaintiff’s [injury] [and] [or] [damage], then the manufacturer is [subject to liability] [at fault].

NOTE ON USE

Use this instruction if there is a claim against a manufacturer that the product was not reasonably safe as designed. If only one of the two tests is being used by the court, modify the instruction accordingly.

Use bracketed material as applicable. Use the bracketed paragraph concerning foreseeability when there are claims of negligence as well as strict liability or when foreseeability concepts have otherwise been injected into the trial. The bracketed “at fault” language is intended to be used in conjunction with WPI 110.31.01.02 (defining “fault”) and with WPI 110.31.01.01 (the corresponding special verdict form) for cases involving mixed standards of care (e.g., negligence and strict liability); see the Notes on Use and Comments for WPI 110.31.01.01 (the corresponding special verdict form) and WPI 110.31.01.02 (defining “fault”).

A special instruction may be needed if the product defect did not cause the accident, but it is claimed that the defect was a proximate cause of enhanced injury. See the discussion in the Comment below; see also WPI 110.02.02 (Crashworthiness—Manufacturing and/or Design Defect).

Use WPI 110.04 (Seller—Manufacturer—Defined) with this instruction.

COMMENT

RCW 7.72.030(1).

The format of this instruction has been modified for this edition. No

substantive change is intended. This instruction as now formatted isolates the phrase “was outweighed by” in the first test to emphasize which factors are being balanced against which.

The Washington Product Liability Act (WPLA), RCW Chapter 7.72, states in part that a “product manufacturer is subject to liability to a claimant if the claimant’s harm was proximately caused by the negligence of the manufacturer in that the product was not reasonably safe as designed.” RCW 7.72.030(1). The Act provides two different ways for plaintiffs to show that a product was defectively designed.

First, the plaintiff may use the risk-utility approach from RCW 7.72.030(1)(a), which provides that:

A product is not reasonably safe as designed, if, at the time of manufacture, the likelihood that the product would cause the claimant’s harm or similar harms, and the seriousness of those harms, outweighed the burden on the manufacturer to design a product that would have prevented those harms and the adverse effect that an alternative design that was practical and feasible would have on the usefulness of the product.

Second, the plaintiff may show under RCW 7.72.030(3) that the product “was unsafe to an extent beyond that which would be contemplated by the ordinary consumer.”

The risk-utility approach of RCW 7.72.030(1)(a) and the consumer-expectations approach of RCW 7.72.030(3) are alternative, independent means of proving defective design. A plaintiff needs to prove only one, not both, of these alternatives. *Ruiz-Guzman v. Amvac Chem. Corp.*, 141 Wn.2d 493, 502–03, 7 P.3d 795 (2000); *Falk v. Keene Corp.*, 113 Wn.2d 645, 782 P.2d 974 (1989).

Risk-utility test—Strict liability. The term “negligence” has not been included in this instruction because the risk-utility test involves strict liability principles that are set forth in *Seattle-First National Bank v. Tabert*, 86 Wn.2d 145, 542 P.2d 774 (1975), notwithstanding the reference in RCW 7.72.030(1) to negligence. *Soproni v. Polygon Apartment Partners*, 137 Wn.2d 319, 971 P.2d 500 (1999); *Falk*, 113 Wn.2d 645; *Couch v. Mine Safety Appliances Co.*, 107 Wn.2d 232, 239 n. 5, 728 P.2d 585 (1986). In *Falk*, the court held that that the “negligence” referred to in RCW 7.72.030(1) is the “negligence of the manufacturer *in that* the product was not reasonably safe.” *Falk*, 113 Wn.2d at 657 (italics supplied by court). The court in *Falk* specifically approved WPI 110.02 in its pre-2012 form. *Falk*, 113 Wn.2d at 657.

Risk-utility test—Balancing of factors. The risk-utility test in

RCW 7.72.030(1)(a) requires a balancing of factors. In *Ayers v. Johnson & Johnson Baby Products Co.*, 117 Wn.2d 747, 818 P.2d 1337 (1991), a case alleging that the manufacturer failed to provide adequate warnings with a product (baby oil), the court stated:

On one side of the balance in subsection (a) are the likelihood that the product would cause the claimant's harm or similar harms and the seriousness of those harms. On the other side of subsection (a)'s balance are the burden on the manufacturer to design a product that would have prevented those harms, and the adverse effect that a feasible alternative design would have on the usefulness of the product.

Ayers, 117 Wn.2d at 763.

The statutory balancing test has a separate proviso for firearms and ammunition. RCW 7.72.030(1)(a).

Risk-utility test—Alternative design—Other products.

Consideration of reasonably safe alternative designs is not limited to analysis of the product at issue in the case. Rather, a plaintiff may “establish an alternative safer design through ‘other products already available on the market [that] may serve the same or very similar function at lower risk and at comparable cost. Such products may serve as *reasonable alternatives to the product in question.*’” Ruiz-Guzman, 141 Wn.2d at 504 (italics supplied by court) (quoting Restatement (Third) of Torts § 2 cmt. f, at 24 (1998)). The court rejected the manufacturer's argument that the plaintiff had to show the existence of an alternative design that could have been incorporated into the defendant's product at the time it was manufactured. Ruiz-Guzman, 141 Wn.2d at 499, 504–05. Accordingly, the “other products” may include products produced by the defendant manufacturer's competitors. See Ruiz-Guzman, 141 Wn.2d at 503–04.

Because the statute requires that an alternative design be “practical and feasible,” RCW 7.72.030(1)(a), consideration of other products is limited to alternative designs or products that are “technologically achievable and economically viable.” Ruiz-Guzman, 141 Wn.2d at 505 n.8.

Enhanced injury. In *Couch v. Mine Safety Appliances Co.*, 107 Wn.2d 232, 241–43, 728 P.2d 585 (1986), the court discussed enhanced injury instructions in a design defect action brought under RCW 7.72.030. See also *Baumgardner v. Am. Motors Corp.*, 83 Wn.2d 751, 522 P.2d 829 (1974); WPI 110.02.02 (Crashworthiness—Manufacturing and/or Design Defect).

Industry custom. Under RCW 7.72.050(1), evidence of custom in the product seller's industry or of technological feasibility, whether relating to design, construction, or performance of the product, may be considered by the trier of fact. See also *Crittenden v. Fibreboard Corp.*, 58 Wn.App. 649, 794 P.2d 554 (1990) (trial judge committed reversible error by rejecting an instruction that prohibited jurors from considering industry customs and state of the art evidence). Evidence of compliance with codes or standards is relevant, but not determinative, in analyzing either the consumer-expectations approach or the risk-utility approach. *Soproni*, 137 Wn.2d at 328; *Falk*, 113 Wn.2d at 655.

RCW 7.72.030 modified previous case law. See *Lenhardt v. Ford Motor Co.*, 102 Wn.2d 208, 214–15, 683 P.2d 1097 (1984) (in a case involving a pre-WPLA claim, a defendant may not introduce evidence of compliance with industry customs and standards unless the plaintiff first raises this issue).

Consumer expectations. See the Comment to WPI 110.01 (Manufacturer's Duty—Defect in Construction).

Unavoidably unsafe products. See the Comment to WPI 110.02.01 (Manufacturer's Duty—Design—Unavoidably Unsafe Products—Negligence—Comment *k*).

[Current as of February 2021.]

WPI 110.02.01**MANUFACTURER'S DUTY—DESIGN—
UNAVOIDABLY UNSAFE PRODUCTS—
NEGLIGENCE—COMMENT K**

A [pharmaceutical] [medical product] manufacturer has a duty to use reasonable care to design [drugs] [medical products] that are reasonably safe. "Reasonable care" means the care that a reasonably prudent [pharmaceutical] [medical product] manufacturer would exercise in the same or similar circumstances. A failure to use reasonable care is negligence.

The question of whether a manufacturer exercised reasonable care is to be determined by what the manufacturer knew or reasonably should have known at the time the product left its control.

In determining what a manufacturer reasonably should have known in regard to designing its product, you should consider the following:

A [pharmaceutical] [medical product] manufacturer has a duty to use reasonable care to test, analyze, and inspect the products it sells, and is presumed to know what such tests would have revealed.

A [pharmaceutical] [medical product] manufacturer has a duty to use reasonable care to keep abreast of scientific knowledge, discoveries, advances, and research in the field, and is presumed to know what is imparted thereby.

NOTE ON USE

Use this instruction in cases involving prescription drugs and medical devices. In cases of other products that may be considered unavoidably unsafe, such as pesticides, the language should be adapted accordingly.

COMMENT

This instruction was discussed favorably in *Payne v. Paugh*, 190 Wn.App. 383, 410–11, 360 P.3d 39 (2015). See also *Rogers v. Miles Lab'ys, Inc.*, 116 Wn.2d 195, 802 P.2d 1346 (1991); *Transue v. Aesthetech Corp.*, 341 F.3d 911 (9th Cir. 2003) (applying Washington law while holding that comment *k* applies as a blanket rule to prescription drugs and medical products).

Restatement (Second) of Torts § 402A, comment k (unavoidably unsafe products). Comment k to Restatement (Second) of Torts § 402A identifies a category of products for which a manufacturer cannot avoid a high risk of possible harmful effects. Vaccines with side effects are examples, along with other drugs where the prescription drug can possibly save a patient's life, but the risks of physical harm from the drug itself are substantial, even when the drug is properly manufactured. Comment *k* explains: "The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk." Under comment *k*, these unavoidably unsafe products are excluded from the general rule of strict liability, as long as the products are properly prepared and marketed and proper warnings are given.

Comment *k* applies to cases under the Washington Product Liability Act (WPLA) despite not being mentioned by the Act. *Ruiz-Guzman v. Amvac Chem. Corp.*, 141 Wn.2d 493, 505–06, 7 P.3d 795 (2000) (pesticide); *Est. of LaMontagne v. Bristol-Myers Squibb*, 127 Wn.App. 335, 111 P.3d 857 (2005) (prescription drug); *Payne*, 190 Wn.App. 383 (endotracheal tube). In cases where comment *k* applies, the standard of conduct in a design defect case is negligence, not strict liability. *Rogers*, 116 Wn.2d 195; *Young v. Key Pharm.*, 130 Wn.2d 160, 922 P.2d 59 (1991); *Payne*, 190 Wn.App. 383; *Transue*, 341 F.3d 911. For a more complete discussion of comment *k* as it relates to the WPLA, refer to the Comment to WPI 110.03 (Manufacturer's Duty to Provide Warnings or Instructions With Product) and the extended discussion in *Payne v. Paugh*, 190 Wn.App. 383, 409–13, 360 P.3d 39 (2015).

The court in *Payne v. Paugh*, 190 Wn.App. 383, 360 P.3d 39 (2015), held that the trial court did not err by refusing to give a supplemental instruction on the risk utility and consumer expectation tests to define whether a medical device is reasonably safe.

The issue in *Payne* was whether WPI 110.02.01 needed to be

supplemented with a definition of “reasonably safe” as set forth in WPI 110.02 (Manufacturer’s Duty—Design) (absent the first sentence). The court held as follows:

Under the WPLA and case law, the risk utility and consumer expectations tests are used to determine whether a manufacturer is strictly liable and do not apply to a negligence design defect claim under comment k. And contrary to the assertion of [plaintiff], the Comment K Negligence Instruction addresses the factors the jury should consider in determining whether a medical device manufacturer used reasonable care to design a medical device that is reasonably safe. Specifically, “[i]n determining what a medical device manufacturer reasonably should have known in regard to designing its device,” the jury must consider:

A medical device manufacturer has a duty to use reasonable care to test, analyze, and inspect the products it sells, and is presumed to know what such tests would have revealed.

A medical device manufacturer has a duty to use reasonable care to keep abreast of scientific knowledge, discoveries, advances, and research in the field, and is presumed to know what is imparted thereby.

The court did not err in refusing to give the supplemental jury instruction. The instruction the court gave to the jury correctly describes the duty of a manufacturer of unavoidably unsafe products in designing reasonably safe medical devices under comment k of the Restatement (Second) of Torts section 402A.

Payne, 190 Wn.App. at 412–13.

The trial court jury instruction discussed in *Payne* changed the time when a medical product manufacturer is to be judged under WPI 110.02.01 from “at the time of the plaintiff’s injury” to “at the time the product left its control.” *Payne*, 190 Wn.App. at 411. The WPI Committee has made this change to the jury instruction which conforms to the language in WPI 110.21 (Burden of Proof—Design—No Affirmative Defense).

While the standard is negligence for comment k products when a design defect is claimed, the standard is strict liability for comment k cases involving a failure to warn. *Taylor v. Intuitive Surgical, Inc.*, 187 Wn.2d 743, 389 P.3d 517 (2017); see Comment to WPI 110.03 (Manufacturer’s Duty to Provide Warnings or Instructions with Product).

[Current as of December 2020.]

WPI 110.02.02

**CRASHWORTHINESS / ENHANCED DAMAGE AND
INJURY—MANUFACTURING AND/OR DESIGN
DEFECT**

A manufacturer of a (name of product) has a duty to [manufacture] [design] the product to be crashworthy, that is, the product must be reasonably safe in reasonably foreseeable accidents or collisions. Based on this duty, a manufacturer of a (name of product) is liable for that portion of the damage or injury caused by the product design or manufacturing defect over and above the injury or damage that probably would have occurred as a result of a reasonably foreseeable accident or collision impact even without the product defect. The manufacturer is liable for this enhanced injury or damage even though the defect did not cause the accident or collision itself. [However, a manufacturer of a (name of product) is liable only for any of the plaintiff's enhanced injuries that were proximately caused by the alleged [manufacturing] [design] defects in the manufacturer's product or its component parts, and not injuries caused by the primary accident or collision itself.]

NOTE ON USE

Use this instruction in cases in which a party has presented sufficient evidence to establish that plaintiff's injury or enhanced injury was proximately caused by a manufacturing or design defect, but was not necessarily caused by the accident itself. This instruction may also be used in situations involving warning issues. See the Comment below.

Use bracketed material as applicable.

COMMENT

In general. In the landmark case of *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968), the court held that a vehicle manufacturer could be liable for "enhanced" injury caused by the failure of the vehicle to be crashworthy, but only for those injuries caused by that failure.

[T]he manufacturer should be liable for that portion of the damage

or injury caused by the defective design *over and above* the damage or injury that probably would have occurred as a result of the impact or collision absent the defective design.

Larsen, 391 F.2d at 503 (emphasis added).

Washington expressly follows *Larsen* in imposing crashworthiness duties for design and manufacturing defects. *Couch v. Mine Safety Appliances Co.*, 107 Wn.2d 232, 728 P.2d 585 (1986); *Seattle-First Nat'l Bank v. Tabert*, 86 Wn.2d 145, 542 P.2d 774 (1975); *Baumgardner v. Am. Motors Corp.*, 83 Wn.2d 751, 522 P.2d 829 (1974). For example, *Baumgardner* involved claims for personal injuries and wrongful death resulting from an automobile collision in which a defective front seat broke loose and was propelled forward. The plaintiff, not wearing a seatbelt, was injured. The plaintiff's wife, wearing a seatbelt but not a shoulder harness, was killed after being crushed between the seat and the belt. The court distinguished accident causation from injury causation, noting that the plaintiff's claim was for his "enhanced injuries." *Baumgardner*, 83 Wn.2d at 758. Similarly, in *Couch*, when a safety helmet failed, the court specified that the claim was for the harm over and above what would have been sustained without the defect, again drawing the line between injury causation and accident causation. *Couch*, 107 Wn.2d at 242-43; cf. *Phennah v. Whalen*, 28 Wn.App. 19, 621 P.2d 1304 (1980).

Component parts. The 1981 Washington Product Liability Act focuses on component parts of the product that caused the injury in its definition of "product":

(3) Product. . . . The "relevant product" under this chapter is that product or its component part or parts which gave rise to the product liability claim.

RCW 7.72.010(3).

In a crashworthiness case the "relevant product" is generally some subcomponent of the vehicle such as an airbag, restraint, fuel system, roof, or steering column instead of the vehicle itself. Thus, the overall safety record of the vehicle is not relevant to the issue of whether or not the "relevant product" is unsafe. See, e.g., *Skeie v. Mercer Trucking Co.*, 115 Wn.App. 144, 150, 61 P.3d 1207 (2003) ("Although a product may be safe for its intended use, its manufacturer may still be liable for other unsafe uses that are reasonably foreseeable"). In addition, because the emphasis is on the defective component, causation issues relating to allocation of fault and comparative fault are more narrowly focused and confined to conduct relating to the defective components rather than conduct relating to the vehicle as a whole.

[Current as of December 2020.]

WPI 110.02.03

**CRASHWORTHINESS / ENHANCED DAMAGE AND
INJURY—MANUFACTURING AND/OR DESIGN
DEFECT—BURDEN OF PROOF—ALLOCATION OF
FAULT**

In a case for enhanced injuries, the plaintiff has the burden of proving each of the following propositions:

First, that (name of manufacturer) [manufactured] [designed] a product (name of product) that was not reasonably safe in reasonably foreseeable accidents or collisions; and

Second, that the unsafe condition of the (name of product) proximately caused the plaintiff injuries which [he] [she] would not have otherwise sustained in the accident or collision, absent the product defect.

The plaintiff need not prove that the unsafe condition of the product was a cause of the accident or collision itself, just that the unsafe condition of the product was a proximate cause of the enhanced injury or damage.

If you find from your consideration of all of the evidence that both of these propositions has been proved against (name of manufacturer), then your verdict should be for the plaintiff on this issue. You should answer Question No. _____ of the verdict form “yes.”

On the other hand, if you find that either of these propositions has not been proved against (name of manufacturer), your verdict on this issue should be for (name of manufacturer). You should answer Question No. _____ of the verdict form “no.”

NOTE ON USE

This instruction on the plaintiff's burden of proof applies only if a legal determination has been made that fault should be separately allocated for a plaintiff's enhanced injuries. See the Comment below. If

the court determines that fault should be separately allocated for a plaintiff's enhanced injuries, incorporate WPI 110.02.04 (Crashworthiness/Enhanced Damage and Injury—Manufacturing and/or Design Defect—Verdict Form for Use with WPI 110.30.01, 110.30.02, 110.31.01, and 110.31.02) into the verdict form presented to the jury with this instruction.

Use WPI 21.01 (Meaning of Burden of Proof—Preponderance of Evidence) with this instruction.

COMMENT

For a general discussion of crashworthiness or enhanced injury cases, see the Comment to WPI 110.02.02 (Crashworthiness/Enhanced Damage and Injury—Manufacturing and/or Design Defect).

Allocation of fault. There is no case law in Washington addressing the question of whether contributory negligence (and/or assumption of the risk) applies in an enhanced injury/crashworthiness case under Washington's comparative fault statutes (RCW 4.22.005, RCW 4.22.015, and RCW 4.22.070). However, a number of courts outside Washington have addressed whether primary fault should be compared with enhanced-injury fault under a scheme of comparative fault when apportioning damages in enhanced-injury cases.

Some courts favor comparing primary fault with enhanced-injury fault, thereby reducing the plaintiff's recovery for enhanced injuries in proportion to the plaintiff's primary fault. See, e.g., *Montag v. Honda Motor Co.*, 75 F.3d 1414, 1419 (10th Cir. 1996); *Keltner v. Ford Motor Co.*, 748 F.2d 1265, 1267–68 (8th Cir. 1984); *Hinkamp v. Am. Motors Corp.*, 735 F. Supp. 176, 178 (E.D.N.C. 1989); *Trust Corp. of Mont. v. Piper Aircraft Corp.*, 506 F. Supp. 1093, 1098 (D. Mont. 1981); *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 428 (Tex. 1984). These courts favor such a comparison for various reasons: some courts do not distinguish between primary injuries and enhanced injuries, others assume that fault for the primary accident is a proximate cause of enhanced injuries, and still other courts state that primary fault should be compared with enhanced-injury fault.

Other courts use only enhanced-injury fault to apportion responsibility for enhanced injuries. See, e.g., *Egbert v. Nissan Motor Co.*, 2010 UT 8, 228 P.3d 737 (Utah 2010); *Jahn v. Hyundai Motor Co.*, 773 N.W.2d 550 (Iowa 2009); *Bearint v. Dorell Juvenile Group, Inc.*, 389 F.3d 1339 (11th Cir. 2004); *Kutsugeras v. AVCO Corp.*, 973 F.2d 1341, 1344–45 (7th Cir. 1992); *Andrews v. Harley Davidson, Inc.*, 106 Nev. 533, 537–38, 796 P.2d 1092 (1990). These courts emphasize that under an enhanced-

injury analysis, a primary accident has happened and the crashworthiness of the vehicle is evaluated without considering the cause of that primary accident. Therefore, liability for enhanced injury is imposed only if the defendant has breached an enhanced-injury duty. The cause of the primary accident is obviously relevant to the cause of the primary injuries, but it is not relevant to the cause of the enhanced injuries.

For an in-depth discussion of this issue, see Egbert, 2010 UT at ¶¶ 21–40; Jahn, 773 N.W.2d at 553–61; Owen & Davis, Owen & Davis on Products Liability §§ 21.4–.5 (4th ed. 2021); see also Harkins, *Holding Tortfeasors Accountable: Apportionment of Enhanced Injuries Under Washington’s Comparative Fault Scheme*, 76 Wash. L.Rev. 1185 (2001); Beck, *Enhanced Injury: A Direction for Washington*, 61 Wash. L.Rev. 571 (1986).

Burden of proof. In *Baumgardner v. American Motors Corp.*, 83 Wn.2d 751, 758, 522 P.2d 829 (1974), the Washington Supreme Court held that “the plaintiff has the usual burdens of proof as in any negligence action [or strict liability action] including proof of the nature and extent of the injuries proximately caused or enhanced by the defect.” See also *Couch v. Mine Safety Appliances Co.*, 107 Wn.2d 232, 242, 728 P.2d 585 (1986).

[Current as of January 2021.]

WPI 110.02.04

**CRASHWORTHINESS / ENHANCED DAMAGE AND
INJURY—MANUFACTURING AND/OR DESIGN
DEFECT—VERDICT FORM FOR USE WITH WPI
110.30.01, 110.30.02, 110.31.01, AND 110.31.02**

QUESTION NO. ____: Did a manufacturing or design defect in the (name of product) [or its component parts] proximately cause the plaintiff to suffer enhanced injuries?

ANSWER: _____ (Write "Yes" or "No")

(DIRECTION: If you answer "yes" to the preceding question, then answer the next question. If you answer "no" to the preceding question, then do not answer the next question.)

QUESTION NO. ____: What is the amount of money required to reasonably and fairly compensate the plaintiff for any enhanced injuries as you find were proximately caused by the [manufacturing] [design] defect of the (name of product)?

ANSWER: \$_____

NOTE ON USE

Incorporate these interrogatories into the verdict form presented to the jury if the court determines that fault should be separately allocated to the manufacturer of the product for a plaintiff's enhanced injuries. The verdict forms for product liability cases will need to be modified if there is a crashworthiness claim made in conjunction with other product liability claims, negligence claims, and other causes of action that are related to the primary accident. The crashworthiness duty is separate from the standard of care (strict liability or negligence) that is described in the other product liability instructions.

For the crashworthiness claim, the jury will need to have a separate set of forms—for crashworthiness and enhanced injury only—that are consistent with the Tort Reform Act apportionment principles, but are not identical to the forms used in relation to the primary accident.

See WPI 110.30.01 (Special Verdict Form—Product Liability—No Affirmative Defenses—No Empty Chairs); WPI 110.30.02 (Special Verdict Form—Product Liability—No Affirmative Defenses—Empty Chairs); WPI 110.31.01 (Special Verdict Form—Product Liability—Assumption of Risk—Contributory Negligence—No Empty Chairs); WPI 110.31.02 (Special Verdict Form—Product Liability—Assumption of Risk—Contributory Negligence—Empty Chairs); see also WPI Chapter 45 (Forms of Verdicts). The jury instructions will often need to precisely explain to the jury the rules for allocating the percentage of fault to those defendants found to be liable, and possibly to those plaintiffs found to be at fault for their own injury. While it may be a challenge to simplify the law in light of RCW 4.22.015, 4.22.070, *Tegman v. Accident & Med. Investigations, Inc.*, 150 Wn.2d 102, 105, 108–20, 75 P.3d 497 (2003), and *Rollins v. King County Metro Transit*, 148 Wn.App. 370, 376–79, 199 P.3d 499 (2009), product liability cases require tailored jury instructions and verdict forms that bring together instructions from WPI Chapter 110 and other chapters. See generally, *Coulter v. Asten Grp., Inc.*, 135 Wn.App. 613, 617–18, 622–23, 146 P.3d 444 (2006); *Lundberg v. All-Pure Chem. Co.*, 55 Wn.App. 181, 186–87, 777 P.2d 15 (1989).

Use this instruction with WPI 110.02.02 (Crashworthiness/Enhanced Damage and Injury—Manufacturing and/or Design Defect).

Use bracketed material as applicable.

COMMENT

See the Comment to WPI 110.02.02 (Crashworthiness/Enhanced Damage and Injury—Manufacturing and/or Design Defect).

[Current as of December 2020.]

WPI 110.03**MANUFACTURER'S DUTY TO PROVIDE WARNINGS OR INSTRUCTIONS WITH PRODUCT**

A manufacturer has a duty to supply products that are reasonably safe.

A product may be not reasonably safe because adequate warnings or instructions were not provided with the product.

There are two tests for determining whether a product is not reasonably safe because adequate warnings or instructions were not provided with the product. The plaintiff may prove that the product was not reasonably safe because adequate warnings or instructions were not provided with the product using either of these two tests.

The first test is whether, at the time of manufacture:

- (1) the likelihood that the product would cause injury or damage similar to that claimed by the plaintiff, and the seriousness of such injury or damage, rendered the warnings or instructions of the manufacturer inadequate; and**
- (2) the manufacturer could have provided adequate warning or instructions.**

The second test is whether the product is unsafe to an extent beyond that which would be contemplated by an ordinary user. In determining what an ordinary user would reasonably expect, you should consider the following:

- (1) the relative cost of the product;**
- (2) the seriousness of the potential harm from the claimed defect;**

- (3) the cost and feasibility of eliminating or minimizing the risk; and
- (4) such [other] factors as the nature of the product and the claimed defect indicate are appropriate

[A product can be “not reasonably safe” even though the risk that it would cause the plaintiff’s harm or similar harms was not foreseeable by the manufacturer at the time the product left the manufacturer’s control.]

If you find that the product was not reasonably safe because adequate warnings or instructions were not provided with the product and this was a proximate cause of the plaintiff’s [injury] [and] [or] [damage], then the manufacturer is [subject to liability] [at fault].

NOTE ON USE

Use this instruction if there is a claim against a manufacturer that the product was not reasonably safe because adequate warnings or instruction were not provided with the product. If only one of the two tests is being used by the court, modify the instruction accordingly.

Use bracketed material as applicable. Use the bracketed paragraph concerning foreseeability when there are claims of negligence as well as strict liability or when foreseeability concepts have otherwise been injected into the trial. The bracketed “at fault” language is intended to be used in conjunction with WPI 110.31.01.02 (defining “fault”) and with WPI 110.31.01.01 (the corresponding special verdict form) for cases involving mixed standards of care (e.g., negligence and strict liability); see the Notes on Use and Comments for WPI 110.31.01.01 (the corresponding special verdict form) and WPI 110.31.01.02 (defining “fault”).

Use WPI 110.04 (Seller—Manufacturer—Defined) with this instruction.

Use either WPI 110.21.01 (Burden of Proof—Duty to Provide Warnings with Product—No Affirmative Defense) or WPI 110.23.01 (Burden of Proof—Duty to Provide Warnings With Product—Assumption of Risk or Contributory Negligence) with this instruction.

COMMENT

The statute. RCW 7.72.030(1) states in part that a “product

manufacturer is subject to liability to a claimant if the claimant's harm was proximately caused by the negligence of the manufacturer in that the product . . . was not reasonably safe because adequate warnings or instructions were not provided."

In *Macias v. Saberhagen Holdings, Inc.*, 175 Wn.2d 402, 282 P.3d 1069 (2012), the court held that manufacturer of respirators had a duty to warn users of the product of a need to take precautions when cleaning the units in order to avoid exposure to asbestos and other harmful substances which had been captured in the filtering. See also *Woo v. Gen. Elec. Co.*, 198 Wn.App. 496, 393 P.3d 869 (2017) (duty to warn—exposure to asbestos-containing components manufactured by others).

The Washington Product Liability Act (WPLA) provides two different ways for plaintiffs to prove inadequate warnings. First, the plaintiff may use the balancing-test approach from RCW 7.72.030(1)(b), which provides that:

A product is not reasonably safe because adequate warnings or instructions were not provided with the product, if, at the time of manufacture, the likelihood that the product would cause the claimant's harm or similar harms, and the seriousness of those harms, rendered the warnings or instructions of the manufacturer inadequate and the manufacturer could have provided the warnings or instructions which the claimant alleges would have been adequate.

Second, the plaintiff may show under RCW 7.72.030(3) that the product "was unsafe to an extent beyond that which would be contemplated by the ordinary consumer." See *Kirkland v. Emhart Glass S.A.*, 805 F.Supp.2d 1072, 1076–77 (W.D. Wash. 2011).

The balancing-test approach of RCW 7.72.030(1)(b) and the consumer-expectations approach of RCW 7.72.030(3) are alternative, independent means of proving inadequate warnings. A plaintiff needs to prove only one, not both, of these alternatives. *Ayers v. Johnson & Johnson Baby Prods. Co.*, 117 Wn.2d 747, 765–66, 818 P.2d 1337 (1991).

Balancing test—Factors. The court in *Ayers* characterized the factors in the balancing test as follows:

[O]n one side of the balance in subsection (b) are the likelihood that the product would cause the claimant's harm or similar harms and the seriousness of those harms. On the other side of subsection (b)'s balance are the adequacy of the warnings that were provided and the ability of the manufacturer to have provided an alternative warning that would have prevented the injury.

Ayers, 117 Wn.2d at 763.

Balancing test—Strict liability. The balancing-test approach of RCW 7.72.030(1)(b) is based on the strict liability principles expressed in *Seattle-First National Bank v. Tabert*, 86 Wn.2d 145, 542 P.2d 774 (1975). Ayers, 117 Wn.2d at 761–65. As such, foreseeability is not an element of the balancing test for a failure-to-warn claim. Ayers, 117 Wn.2d at 764–65.

Balancing test—Proof of alternative warnings. The language of RCW 7.72.030(1)(b), which requires the trier of fact in a failure to warn case to consider whether “the manufacturer could have provided warnings or instructions which the claimant alleges would have been adequate,” does not require the claimant to establish the exact wording of the alternative warning. The statute’s requirement is satisfied if the claimant specifies the substance of the warning. Ayers, 117 Wn.2d at 755–56.

Consumer-expectations test. See Comment to WPI 110.02 (Manufacturer’s Duty—Design).

Comment k—Unavoidably unsafe products. See related discussion in the Comment to WPI 110.02 (Manufacturer’s Duty—Design) (discussing comment k of Restatement (Second) of Torts § 402A). In *Ruiz-Guzman v. Amvac Chemical Corp.*, 141 Wn.2d 493, 7 P.3d 795 (2000), the Washington Supreme Court incorporated comment k into the WPLA. Comment k has most often been applied to prescription drug and medical products cases. Strict liability, not negligence, is the standard to be applied in comment k cases based on a theory of inadequate warnings. *Taylor v. Intuitive Surgical, Inc.*, 187 Wn.2d 743, 389 P.3d 517 (2017).

Learned intermediary doctrine. In prescription drug and medical products cases, if adequate warning has been given to the prescribing health care provider, often a physician, the seller or manufacturer usually has no duty to warn the ultimate user. *Terhune v. A.H. Robins Co.*, 90 Wn.2d 9, 577 P. 2d 975 (1978) (prescription medical product); *Wash. State Physicians Ins. Exch. v. Fisons Corp.*, 122 Wn.2d 299, 858 P. 2d 1054 (1993) (prescription drug). In such cases, the WPI Committee recommends that “ordinary [physician] [healthcare provider] user” be substituted for “ordinary user”. If the manufacturer provides information directly to the consumer, as in a user manual or promotional materials, the manufacturer may assume the duty to provide adequate warnings directly to the user. Restatement (Second) of Torts § 324A. See *Luttrell v. Novartis Pharmaceuticals*, 894 F.Supp.2d 1324 (E.D. Wash. 2012), affirmed, 555 F.App’x 710 (9th Cir. 2014), for an extended

discussion on the learned intermediary doctrine and the application of proximate cause in the context of a claim of inadequate warnings.

The learned intermediary doctrine has occasionally been applied to cases not involving prescription drugs or medical products. In *Lunt v. Mount Spokane Skiing Corp.*, 62 Wn.App. 353, 814 P.2d 1189 (1991), the court held that the manufacturer of ski bindings met its duty to warn under RCW 7.72.030(1) by providing detailed warnings to the operator of the ski area. The *Lunt* court noted that the manufacturer had a reasonable basis to believe that the ski area operator would pass along those warnings. The court also noted that a ski binding manufacturer who makes bindings for rental use has limited opportunities to communicate directly with the consumer.

Duty to warn hospital-purchaser. A medical product manufacturer has a duty under the WPLA to provide adequate warnings to a hospital-purchaser of medical products. This is separate from and in addition to the manufacturer's duty to warn physicians under the learned intermediary doctrine. As stated in *Taylor v. Intuitive Surgical, Inc.*, 187 Wn.2d 743, 759, 389 P.3d 517, "[h]ospitals have an independent duty to ensure that a device is used safely. They can meet that duty only if they are informed of the risks of using a device." *Taylor*, 187 Wn.2d at 754. In addition, "hospitals need product warnings to design a credentialing process that will keep patients as safe as possible." *Taylor*, 187 Wn.2d at 755.

Sophisticated purchasers. The Washington Supreme Court has rejected a "sophisticated user" approach that would modify a duty to warn. *Rublee v. Carrier Corp.*, 192 Wn.2d 190, 207–08, 428 P.3d 1207 (2018). There is one exception to this general rule. In the context of pharmaceuticals or medical devices, Washington does not differentiate between the types of users or consumers to whom a duty to warn is owed. *Rublee*, 192 Wn.2d at 208.

Duty to warn under common law. The following discussion relates to the law on warnings prior to RCW 7.72.030(1)(b). RCW 7.72.020 provides that "the previous existing applicable law of this state" on product liability is modified only to the extent set forth in RCW Chapter 7.72. The cases below should be carefully studied with the new statute in mind.

The duty to warn exists, even if the danger is unknown to the supplier and the product has been faultlessly manufactured and designed, if it is not reasonably safe when used in the absence of warnings. *Teagle v. Fischer & Porter Co.*, 89 Wn.2d 149, 570 P.2d 438 (1977). When the danger is obvious or known, there is no duty to warn. *Haysom v. Coleman Lantern Co.*, 89 Wn.2d 474, 573 P.2d 785 (1978).

In *Little v. PPG Industries, Inc.*, 92 Wn.2d 118, 594 P.2d 911 (1979), the court approved instructions that set out several aspects of the duty to warn, including advising of the nature of the danger, the seriousness of the consequences of improper use, and measures to take to avoid the danger. The court does not need to furnish guidelines to aid the jury in determining whether the warning is adequate in a case when the danger is not clearly latent. *Berry v. Coleman Sys. Co.*, 23 Wn.App. 622, 596 P.2d 1365 (1979). The adequacy of warnings to minors who use dangerous products is discussed in *Baughn v. Honda Motor Co.*, 107 Wn.2d 127, 727 P.2d 655 (1986), and *Novak v. Piggly Wiggly Puget Sound Co.*, 22 Wn.App. 407, 591 P.2d 791 (1979).

The fact that the user knew of the dangerous condition, thus eliminating the need for a warning, does not, of itself, absolve the manufacturer of liability for defective design. *Lamon v. McDonnell Douglas Corp.*, 19 Wn.App. 515, 576 P.2d 426 (1978), affirmed, 91 Wn.2d 345, 588 P.2d 1346 (1979).

[Current as of January 2021.]

WPI 110.03.01**MANUFACTURER'S DUTY TO PROVIDE WARNINGS
OR INSTRUCTIONS AFTER THE PRODUCT WAS
MANUFACTURED**

A manufacturer has a duty to supply products that are reasonably safe.

A product may be not reasonably safe because adequate warnings or instructions were not provided after the product was manufactured.

A product is not reasonably safe because adequate warnings or instructions were not provided after the product was manufactured if:

- (1) A manufacturer learned, or if a reasonably prudent manufacturer should have learned, about a danger connected with the product after it was manufactured;**
- (2) Without adequate warnings or instructions, the product was unsafe to an extent beyond that which would be contemplated by an ordinary user; and**
- (3) The manufacturer failed to issue warnings or instructions concerning the danger in the manner that a reasonably prudent manufacturer would act in the same or similar circumstances.**

The duty to issue warnings or instructions is satisfied if the manufacturer exercises reasonable care to inform product users.

In determining whether a product was unsafe to an extent beyond that which would be contemplated by an ordinary user, you should consider the following:

- (1) the relative cost of the product;
- (2) the seriousness of the potential harm from the claimed defect;
- (3) the cost and feasibility of eliminating or minimizing the risk; and
- (4) such [other] factors as the nature of the product and the claimed defect indicate are appropriate.

If you find the product was not reasonably safe because the manufacturer did not provide adequate warnings or instructions after the product was manufactured and this was a proximate cause of the plaintiff's [injury] [and] [or] [damage], then the manufacturer is [subject to liability] [at fault].

NOTE ON USE

Use this instruction if there is a claim against a manufacturer that the product was not reasonably safe because adequate warnings or instructions were not provided after the product was manufactured.

Use bracketed material as applicable. The bracketed "at fault" language is intended to be used in conjunction with WPI 110.31.01.02 (defining "fault") and with WPI 110.31.01.01 (the corresponding special verdict form) for cases involving mixed standards of care (e.g., negligence and strict liability); see the Notes on Use and Comments for WPI 110.31.01.01 (the corresponding special verdict form) and WPI 110.31.01.02 (defining "fault").

Use WPI 110.04 (Seller—Manufacturer—Defined) with this instruction.

Use WPI 10.01 (Negligence—Adult—Definition) with this instruction.

Use either WPI 110.21.02 (Burden of Proof—Duty to Provide Warnings After the Product was Manufactured—No Affirmative Defense) or WPI 110.23.02 (Burden of Proof—Duty to Provide Warnings After the Product Was Manufactured—Assumption of Risk or Contributory Negligence) with this instruction.

In drug cases, the phrase "ordinary physician user" should be

substituted for “ordinary user.” See the Comment to WPI 110.03 (Manufacturer’s Duty to Provide Warnings or Instructions With Product).

COMMENT

RCW 7.72.030(1)(c).

RCW 7.72.030(1) states in part that a “product manufacturer is subject to liability to a claimant if the claimant’s harm was proximately caused by the negligence of the manufacturer in that the product . . . was not reasonably safe because adequate warnings or instructions were not provided.”

RCW 7.72.030(1)(c) provides that:

A product is not reasonably safe because adequate warnings or instructions were not provided after the product was manufactured where a manufacturer learned or where a reasonably prudent manufacturer should have learned about a danger connected with the product after it was manufactured. In such a case, the manufacturer is under a duty to act with regard to issuing warnings or instructions concerning the danger in the manner that a reasonably prudent manufacturer would act in the same or similar circumstances. This duty is satisfied if the manufacturer exercises reasonable care to inform product users.

Subsection (1)(c) incorporates principles of traditional negligence rather than strict liability. See *Ayers v. Johnson & Johnson Baby Prods. Co.*, 117 Wn.2d 747, 818 P.2d 1337 (1991); *Falk v. Keene*, 113 Wn.2d 645, 782 P.2d 974 (1989); *Lundberg v. All-Pure Chem. Co.*, 55 Wn.App. 181, 777 P.2d 15 (1989).

In a case involving a claim that arose before the effective date of RCW 7.72.030(1), the court held that if a person’s susceptibility to the danger of a product continues after that person’s direct exposure to the product has ceased, the manufacturer still has a duty after exposure to exercise reasonable care to warn the person of known dangers, if the warning could help to prevent or lessen the harm. *Lockwood v. AC & S, Inc.*, 109 Wn.2d 235, 744 P.2d 605 (1987).

For additional discussion of issues relating to warnings, see the Comment to WPI 110.03 (Manufacturer’s Duty to Provide Warnings or Instructions with Product).

Comment k products—Learned intermediary doctrine. See

discussion in the Comment to WPI 110.03 (Manufacturer's Duty to Provide Warnings or Instructions with Product). Comment *k* products are usually prescription drug or medical products. If given, WPI 110.03 (Manufacturer's Duty to Provide Warnings or Instructions with Product) and WPI 110.03.01 should be modified in most comment *k* cases by replacing "ordinary user" with "ordinary [physician] [health care provider] user."

[Current as of December 2020.]

WPI 110.04**SELLER—MANUFACTURER—DEFINED**

[The defendant (name) is a manufacturer of the (fill in product).]

[The defendant (name) is a product seller of the (fill in product).]

[A product seller is any person or entity that is engaged in the business of selling products, whether the sale is for resale, or for use and consumption. The term includes a manufacturer, wholesaler, distributor, or retailer of the relevant product. [The term also includes a party who is in the business of leasing products.]]

[“Manufacturer” includes a product seller who designs, produces, makes, fabricates, constructs, or remanufactures the relevant product or component part of a product before its sale to a user or consumer. [The term also includes a product seller or entity not otherwise a manufacturer that holds itself out as a manufacturer.]] [The term also includes a product seller, distributor, or other entity not otherwise a manufacturer who an ordinary, reasonable consumer would understand from the entity’s representations was a manufacturer.]

NOTE ON USE

Use this instruction with WPI 110.01 (Manufacturer’s Duty—Defect in Construction), WPI 110.01.01 (Manufacturer’s Duty—Express Warranties), WPI 110.02 (Manufacturer’s Duty—Design), WPI 110.02.01 (Manufacturer’s Duty—Design—Unavoidably Unsafe Products—Negligence—Comment K), WPI 110.02.02 (Crashworthiness / Enhanced Damage and Injury—Manufacturing and/Or Design Defect), WPI 110.03 (Manufacturer’s Duty to Provide Warnings or Instructions With Product), and/or WPI 110.03.01 (Manufacturer’s Duty to Provide Warnings or Instructions After the Product Was Manufactured) which relate to a manufacturer’s duties. Also use this instruction if the case includes a claim of negligence, express warranty, or misrepresentation against a seller other than a manufacturer.

Use bracketed material as applicable. Use only the bracketed first or second sentence if there is no issue over the defendant's status as a manufacturer or product seller.

COMMENT

This instruction has been modified for this edition to include entities that an ordinary and reasonable consumer would consider to be a manufacturer based on the entity's representations.

RCW 7.72.010.

See the statute for specific exceptions from the definition of "seller" and for specific indications of who is or is not a manufacturer. The definition of seller set forth in the statute includes a party who is in the business of "leasing or bailing" products. If the bailment arrangement is not covered by the word "leasing" a special instruction is needed to fit the case. The word "bailment" should not be used unless it is defined.

For a discussion of when a seller may be liable, see the Comment accompanying WPI 110.07 (Seller Other than Manufacturer).

Product seller. If the product has a label attached to it bearing the name of the seller, with inventory and bar code numbers and the name of the seller, then the company whose name is on the product is subject to liability as a product seller who markets a product under their trade name. *Farmers Ins. Co. v. Waxman Indus., Inc.*, 132 Wn.App. 142, 130 P.3d 874 (2006); see also *Heneghan v. Crown Crafts Infant Prods., Inc.*, 868 F.Supp.2d 1153 (W.D. Wash. 2012).

RCW 7.70.040(2) provides in pertinent part that a product seller assumes the liability of a product manufacturer under a number of circumstances, including when the product is marketed under a trade name or brand name of the product seller. Thus, when REI marketed a bicycle under its brand name, it stood in the shoes of the actual manufacturer. *Johnson v. Recreational Equip., Inc.*, 159 Wn.App. 939, 247 P.3d 18 (2011).

A firm may be subject to liability for leasing under the WPLA, when the following factors are considered: (1) Is the firm leasing so much product that it is in a "position to exert pressure on the manufacturer to influence the product's design"? (2) Do people who lease the product typically look to this firm for advice regarding selection, operation, and maintenance of the product? (3) Is the firm in a position to be best able to spread costs of injury among the public? If the firm is involved merely in isolated or casual transactions, the firm is not "in the business of

leasing products.” *Bostwick v. Ballard Marine, Inc.*, 127 Wn.App. 762, 767–68, 112 P.3d 571 (2005) (quoting *Buttelo v. S.A. Woods-Yates Am. Mach. Co.*, 72 Wn.App. 397, 401, 864 P.2d 948 (1993)).

The statutory definition of “product seller” is subject to a number of exceptions, including an exception for providers of professional services who use or sell products in the course of their professional practice. See RCW 7.72.010(1); *McKenna v. Harrison Mem’l Hosp.*, 92 Wn.App. 119, 960 P.2d 486 (1998) (hospital qualifying as a provider of professional services). Additional instructions will be necessary whenever a case involves factual issues as to these statutory exceptions.

Product manufacturer. A manufacturer of a product that is not in the chain of distribution of the dangerous product and did not manufacture, sell, or select asbestos insulation (the dangerous product) is not a “manufacturer” of a dangerous product. *Macias v. Saberhagen Holdings, Inc.*, 175 Wn.2d 402, 282 P.3d 1069 (2012); see also *Simonetta v. Viad Corp.*, 165 Wn.2d 341, 197 P.3d 127 (2008); *Braaten v. Saberhagen Holdings*, 165 Wn.2d 373, 198 P.3d 493 (2008).

A manufacturer of component parts of a product may be liable under RCW 7.72.030(1)(a) for an unsafe design if those parts are used and installed without substantial modification in assembling the product. *Parkins v. Van Doren Sales, Inc.*, 45 Wn.App. 19, 724 P.2d 389 (1986); RCW 7.72.010(2) (definition of “manufacturer” with regard to component parts of a product). *Parkins* is in accord with prior law decided under section 402A(1)(b) of Restatement (Second) of Torts (1965) that a plaintiff may be barred from recovery if the products underwent a substantial change in condition after leaving the manufacturer. See *Sepulveda-Esquivel v. Cent. Mach. Works, Inc.*, 120 Wn.App. 12, 84 P.3d 895 (2004); *Padron v. Goodyear Tire & Rubber Co.*, 34 Wn.App. 473, 662 P.2d 67 (1983); *Bich v. Gen. Elec. Co.*, 27 Wn.App. 25, 614 P.2d 1323 (1980).

The court in *Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 840 P.2d 860 (1992), discussed in detail whether a contractor that made, fabricated, and constructed a pipeline for a propane fuel system was a manufacturer under the definition set forth in RCW 7.72.010. See also, *Anderson Hay & Grain Co. v. United Dominion Indus.*, 119 Wn.App. 249, 76 P.3d 1205 (2003) (firm that constructed a grain storage building was a service provider, not a manufacturer or seller); *Almquist v. Finley Sch. Dist. No. 53*, 114 Wn.App. 395, 57 P.3d 1191 (2002) (school district served tacos for lunch; court held that district was liable as a manufacturer, after students were sickened by *E. coli* found in the ground beef used to make the tacos).

Apparent manufacturer. An entity who did not manufacture,

sell, or distribute a product may nonetheless be liable as an “apparent manufacturer.” *Rublee v. Carrier Corp.*, 192 Wn.2d 190, 213–14, 428 P.3d 1207 (2018). An entity is liable as an “apparent manufacturer” if an “ordinary, reasonable” consumer would understand from the entity’s representations that the entity was a manufacturer. *Rublee*, 192 Wn.2d at 210–11. Such representations may include the product’s labels, advertising, or packaging. *Rublee*, 192 Wn.2d at 210–11.

Successor liability. A corporate entity acquiring another’s product line may be liable under successor liability and the “product line doctrine.” *Leren v. Kaiser Gypsum Co., Inc.*, 9 Wn.App.2d 55, 442 P.3d 273 (2019), review denied 194 Wn.2d 1017 (2020). The “product line doctrine” applies where: (1) the successor acquired substantially all of the predecessor’s assets, leaving “a mere corporate shell,”; (2) the successor held itself out to the general public as a continuation of the predecessor by producing the same product line under a similar name; and (3) the successor benefitted from the goodwill of the predecessor. *Leren*, 9 Wn.App.2d at 62–63.

[Current as of December 2020.]

WPI 110.05**GOVERNMENT CONTRACT
SPECIFICATION—DEFENSE**

[If you find that the injury-causing aspect of the product was, at the time of manufacture, in compliance with a specific mandatory government contract specification relating to design, your verdict shall be for the defendant on claims based upon design.]

[If you find that the injury-causing aspect of the product was, at the time of manufacture, in compliance with a specific mandatory government contract specification relating to warnings, your verdict shall be for the defendant on claims based upon warnings.]

The burden of proving this defense by a preponderance of the evidence is on the defendant.

NOTE ON USE

Use this instruction, along with WPI 110.02 (Manufacturer's Duty—Design) or WPI 110.03 (Manufacturer's Duty to Provide Warnings or Instructions With Product), if there is an issue whether the product complied with a specific mandatory specification developed by the government and imposed upon the contractor as a part of a contract with the manufacturer. If there is an issue whether the manufacturer was partly responsible for including the specification in the contract, a special instruction may be needed. See the Comment.

Use bracketed material as applicable. The first paragraph of this instruction should be used if compliance with a government specification relating to design is in issue. The second paragraph of this instruction should be used if compliance with a government specification relating to warnings is in issue.

COMMENT

RCW 7.72.050(2).

The statute provides in part that when "the injury-causing aspect of the product was, at the time of manufacture, in compliance with a

specific mandatory government contract specification relating to design or warnings, this compliance shall be an absolute defense.”

The statute limits this absolute defense to “contract” specifications.

Compliance with mandatory government contract specifications relating to warnings is an absolute defense to a failure-to-warn claim, and compliance with design specifications is an absolute defense to a design defect claim, but compliance with a design specification is not a defense to a failure-to-warn claim (and vice versa). See *Timberline Air Serv., Inc., v. Bell Helicopter-Textron, Inc.*, 125 Wn.2d 305, 311–18, 884 P.2d 920 (1994) (compliance with design specification is not a defense in a failure-to-warn case); see also *Hoglund v. Raymark Indus.*, 50 Wn.App. 360, 749 P.2d 164 (1987) (compliance with government standards unrelated to warnings do not excuse a manufacturer from liability for failure to warn).

There “must be a causal link between the injury and the compliance with the standards set forth in the government contract specifications before the defense arises.” *Timberline*, 125 Wn.2d at 316. The pattern instruction, by bracketing separate paragraphs for design specifications and warning specifications, is consistent with the *Timberline* analysis.

The Court of Appeals held in *In re Estate of Foster*, 55 Wn.App. 545, 779 P.2d 272 (1989), that the trial court did not err in giving an instruction similar to WPI 110.05. The *Foster* court considered whether the defense created by RCW 7.72.050(2) applies if a contractor has engaged in discussions or negotiations with the government regarding the development of specifications. The court stated that RCW 7.72.050(2) cannot be read to deny a manufacturer the defense because the government consulted the manufacturer about the availability of a product required by the specifications. However, the defense might not apply in a case in which the evidence demonstrates consultation and negotiation that is so intense and one sided that the contract specification is constructively the manufacturer’s and not the government’s.

[Current as of December 2020.]

WPI 110.06

GOVERNMENT
SPECIFICATIONS—NONCOMPLIANCE

If the injury-causing aspect of the product was not, at the time of manufacture, in compliance with a specific mandatory government specification relating to design or warnings, the product is not reasonably safe [as designed] [because adequate warnings or instructions were not provided].

NOTE ON USE

Use this instruction, along with WPI 110.02 (Manufacturer's Duty—Design) or WPI 110.03 (Manufacturer's Duty to Provide Warnings or Instructions With Product), if there is an issue whether the product complied with a specific mandatory government specification relating to design or warnings. Use bracketed material as applicable.

COMMENT

RCW 7.72.050(2).

The statute does not limit the specifications to “contract” specifications when dealing with non-compliance as it does when considering the defense. See WPI 110.05 (Government Contract Specifications—Defense). The statute's omission of the word “contract,” however, might have been inadvertent. See Talmadge, *Washington's Product Liability Act*, 5 U. Puget Sound L.Rev. 1, 13 n.54 (1981).

[Current as of December 2020.]

WPI 110.07

SELLER OTHER THAN A MANUFACTURER

(No special instruction is set forth. Use negligence instructions from Part II of 6 Washington Practice, Washington Pattern Jury Instructions: Civil (7th ed.), or draft instructions to fit the particular case.)

COMMENT

RCW 7.72.040(1) expressly provides that a seller other than a manufacturer is liable only for negligence, breach of an express warranty, or misrepresentation.

RCW 7.72.040(2) delineates the situations when a seller other than a manufacturer has the liability of a manufacturer. In such a case the manufacturer's instructions should be used. Whether or not a seller has a manufacturer's liability will usually not present a jury question. If it does, instructions must be drafted for the particular case.

For causes of action arising before the effective date of RCW Chapter 7.72, the Court of Appeals has held that strict liability may be imposed on a dealer of goods under section 402A of the Restatement (Second) of Torts. *Thompson v. Rockford Mach. Tool Co.*, 49 Wn.App. 482, 744 P.2d 357 (1987).

[Current as of December 2020.]

WPI 110.08**USEFUL SAFE LIFE**

A product seller is not liable for injury or damage that occurred after the “useful safe life” of the product has expired. [The burden is on the product seller to prove by a preponderance of the evidence that the useful safe life had expired.]

The useful safe life of a product begins at the time of delivery of the product to its first purchaser [or lessee] who was not engaged in the business of either selling such products or using them as component parts of another product to be sold, and continues during the time that the product would normally be likely to perform or be stored in a safe manner.

[If injury or damage occurred more than twelve years after the time of delivery, a presumption arises that the injury or damage occurred after the useful safe life had expired. This presumption may be rebutted by a preponderance of the evidence.]

NOTE ON USE

Use this instruction if there is an issue under RCW 7.72.060(1)(a) relating to the useful safe life of a product. Do not use this instruction if the facts come within the exceptions listed in RCW 7.72.060(1)(b). Use WPI 21.01 (Meaning of Burden of Proof—Preponderance of the Evidence) with this instruction.

Use bracketed material as applicable. Use the bracketed paragraph relating to the presumption if there is evidence that more than twelve years has expired. If the bracketed paragraph relating to the presumption is used, do not use the bracketed sentence in the first paragraph, which puts the burden of proof on the seller to prove that useful safe life had expired.

COMMENT

RCW 7.72.060(1) and (2).

Statute of repose compared to statute of limitation. RCW

7.72.060(1) is a statute of repose, not a statute of limitation. *Rice v. Dow Chem. Co.*, 124 Wn.2d 205, 212, 875 P.2d 1213 (1994). Under RCW 7.72.060, the plaintiff's injury or damage must occur within a set period of time (the "useful safe life" of the product), regardless of how quickly the plaintiff seeks a legal remedy for such harm. *Morse v. City of Toppenish*, 46 Wn.App. 60, 66, 729 P.2d 638 (1986). This is different from a statute of limitation, which limits how long a plaintiff may wait to pursue a legal remedy, and the plaintiff's diligence and ability to discover the harm or its cause are relevant considerations. *Morse*, 46 Wn.App. at 66.

The "useful safe life" of a product "begins at the time of delivery of the product and extends for the time during which the product would normally be likely to perform or be stored in a safe manner." RCW 7.72.060(1)(a); *Zenaida-Garcia v. Recovery Sys. Tech., Inc.*, 128 Wn.App. 256, 115 P.3d 1017 (2005); *Martin v. Goodyear Tire & Rubber Co.*, 114 Wn.App. 823, 61 P.3d 1196 (2003). "Time of delivery" is defined by RCW 7.72.060(1)(a) as "the time of delivery of a product to its first purchaser or lessee who was not engaged in the business of either selling such products or using them as component parts of another product to be sold."

Pursuant to RCW 7.72.060(2), if harm was caused more than twelve years after the time of delivery, a presumption arises that the harm was caused after the useful safe life of the product had expired. This presumption may be rebutted by a preponderance of evidence.

The statute of repose in the Washington Product Liability Act will not be the same length of time for every product. See *Morse*, 46 Wn.App. at 66 (plaintiff produced an expert's opinion that useful safe life of a 14-foot Duraflex diving board was in excess of 15 to 16 years of constant use). This rebuttable presumption of 12 years may be different from the approach used in product liability statutes of other states. See *Brewer v. Dodson Aviation*, 447 F. Supp.2d 1166, 1177 (W.D. Wash. 2006); *Martin*, 114 Wn.App. at 828.

Choice of law issues. A statute of repose does not fall under RCW 4.18.020 (the statute of limitations borrowing statute). Instead, a statute of repose is classified as substantive law, and will be analyzed as such when a court makes choice-of-law decisions. *Rice*, 124 Wn.2d at 211-12; *Zenaida-Garcia*, 128 Wn.App. at 259-66.

Causation. There is continuing debate as to whether the application of this defense requires the defendant to prove that the age of the product was a proximate cause of the injury or damage to the plaintiff. The instruction as drafted does not include such a requirement.

Statutory exceptions. RCW 7.72.060(b) sets forth exceptions to RCW 7.72.060(1)(a). A product seller may be subject to liability for harm caused by a product used beyond its useful safe life, if:

- (i) The product seller has warranted that the product may be utilized safely for such longer periods; or
- (ii) The product seller intentionally misrepresents facts about its product, or intentionally conceals information about it, and that conduct was a proximate cause of the claimant's harm; or
- (iii) The harm was caused by exposure to a defective product, which exposure first occurred within the useful safe life of the product, even though the harm did not manifest itself until after the useful safe life had expired.

RCW 7.72.060(1)(b).

These exceptions do not lend themselves to a pattern instruction. If there is an issue whether one of the exceptions is applicable, an instruction should be drafted that not only sets forth the useful safe life "defense" but also the exception being raised.

Discovery rule. Because RCW 7.72.060(2) is a statute of repose, not a statute of limitation, it is not affected by the discovery rule. RCW 7.72.060(3) is the statute of limitation applicable to product liability cases and does incorporate a discovery rule. *Mayer v. Sto Indus., Inc.*, 123 Wn.App. 443, 98 P.3d 116 (2004), reversed on other grounds, 156 Wn.2d 677, 132 P.3d 115 (2006). It may be asserted as a defense in addition to the statute of repose.

[Current as of December 2020.]

WPI 110.10

ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE

[Assumption of risk occurs when a person knows of a specific risk associated with using a product, understands the nature of the risk, voluntarily chooses to accept the risk by using the product, and impliedly consents to relieve the defendant of a duty of care owed to the person in relation to the specific risk.]

[Contributory negligence is negligence on the part of a person claiming injury or damage that is a proximate cause of the injury or damage complained of.]

If you find [assumption of risk] [or] [contributory negligence] by the plaintiff, you must determine the degree, expressed as a percentage, to which plaintiff's [assumption of risk] [and] [contributory negligence] contributed to the claimed injury or damage. The court will furnish you a special verdict form for this purpose. Your answers to the questions in the special verdict form will furnish the basis by which the court will apportion damages, if any.

NOTE ON USE

Use the bracketed language relating to assumption of risk or contributory negligence as applicable. Use the language on assumption of risk only when there is substantial evidence that plaintiff appreciated the specific danger that caused the injury. If the language on contributory negligence is used, also use WPI 10.01 (Negligence—Adult—Definition) with this instruction. Use one of the instructions from WPI Chapter 15 defining "proximate cause" with this instruction.

Use either WPI 110.31.01 (Special Verdict Form—Product Liability—Assumption of Risk—Contributory Negligence—No Empty Chairs) or WPI 110.31.02 (Special Verdict Form—Product Liability—Assumption of Risk—Contributory Negligence—Empty Chairs) with this instruction.

If there are affirmative defenses claiming other kinds of fault on

the part of the plaintiff, such legal theories must be defined in an instruction and either added to or substituted for the terms "assumption of risk" or "contributory negligence" in this instruction.

COMMENT

RCW 4.22.015 and RCW 4.22.005.

RCW 4.22.015 defines fault as including "acts or omissions, including misuse of a product that are in any measure negligent or reckless." The term also includes "breach of warranty, unreasonable failure to avoid injury or to mitigate damages."

RCW 4.22.005 provides in part that "any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery."

Contributory negligence. The contributory fault doctrine expressed in RCW 4.22.015 applies to a product liability action regardless of whether the action is based on negligence or strict liability. *Lundberg v. All-Pure Chem. Co.*, 55 Wn.App. 181, 777 P.2d 15 (1989). Accordingly, contributory negligence may be raised as a defense under the Washington Product Liability Act (WPLA) even though the defense was not available under the pre-existing case law. See *Seay v. Chrysler Corp.*, 93 Wn.2d 319, 609 P.2d 1382 (1980).

The instruction's definition of contributory negligence parallels the general pattern instruction on contributory negligence, WPI 11.01.

Assumption of risk. Prior to the adoption of the WPLA, the assumption of risk doctrine applied to product liability cases. See *Klein v. R.D. Werner Co.*, 98 Wn.2d 316, 654 P.2d 94 (1982); *Teagle v. Fischer & Porter Co.*, 89 Wn.2d 149, 570 P.2d 438 (1977); *Seattle-First Nat'l Bank v. Tabert*, 86 Wn.2d 145, 542 P.2d 774 (1975). It appears that this doctrine continues to apply under the WPLA. See RCW 7.72.020(1) (providing that laws pre-dating the WPLA are modified only to the extent set forth in that act).

The instruction is drafted in terms of implied primary, rather than express, assumption of risk. The language is adapted from the generally applicable instruction on implied primary assumption of risk, WPI 13.03. If a case involves allegations that a consumer expressly assumed a risk, such as by a contractual provision, the instruction will need to be modified using language from WPI 13.04 (Assumption of Risk—Express).

For further discussion concerning assumption of risk, see WPI Chapter 13 (Assumption of Risk).

[Current as of December 2020.]

WPI 110.23**BURDEN OF PROOF—DESIGN—ASSUMPTION OF RISK OR CONTRIBUTORY NEGLIGENCE**

The plaintiff has the burden of proving each of the following propositions:

First, that the defendant [was a manufacturer and] supplied a product that was not reasonably safe as designed at the time the product left the defendant's control;

Second, that the [plaintiff was injured] [and] [or] [plaintiff's property was damaged]; and

Third, that the unsafe condition of the product was a proximate cause of the plaintiff's [injury] [and] [or] [damage].

The defendant has the burden of proving [both] [all] of the following propositions:

[First, that the plaintiff assumed the risk of injury or damage from the product;]

[Second, that the plaintiff's assumption of risk was a proximate cause of the plaintiff's own injuries or damages;]

[[Third] [First], that the plaintiff acted, or failed to act, in one of the ways claimed by the defendant, and that in so acting or failing to act, the plaintiff was negligent;]

[[Fourth] [Second], that the negligence of the plaintiff was a proximate cause of the plaintiff's own injuries or damages and was therefore contributory negligence.]

NOTE ON USE

Use this instruction, along with WPI 110.02 (Manufacturer's Duty—Design), if the issue is a manufacturer's strict liability for an unsafe design and there is an affirmative defense of assumption of risk or contributory negligence. For a claim involving enhanced injuries in a crashworthiness case, see the following instructions and their Notes on Use and Comments: WPI 110.02.02 (Injury—Manufacturing and/or Design Defect), WPI 110.02.03 (Injury—Manufacturing and/or Design Defect—Allocation of Fault), and WPI 110.02.04 (Crashworthiness/Enhanced Damage and Injury—Manufacturing and/or Design Defect—Verdict Form for Use with WPI 110.30.01, 110.30.02, 110.31.01, and 110.31.02).

Use bracketed material as applicable. If there is a jury issue whether the defendant was a manufacturer as defined in RCW 7.72.010, use the material in the first set of brackets.

Along with this instruction, use: the applicable proximate cause instruction from WPI Chapter 15; WPI 21.01 (Meaning of Burden of Proof—Preponderance of Evidence); WPI 110.10 (Assumption of Risk—Contributory Negligence); and the appropriate product liability verdict form (either WPI 110.30.01 (Special Verdict Form—Product Liability—No Affirmative Defenses—No Empty Chairs) or WPI 110.30.02 (Special Verdict Form—Product Liability—No Affirmative Defenses—Empty Chairs)).

[Current as of December 2020.]

WPI 110.30.01

**SPECIAL VERDICT FORM—PRODUCT
LIABILITY—NO AFFIRMATIVE DEFENSES—NO
EMPTY CHAIRS**

**IN THE SUPERIOR COURT OF THE STATE OF WASHING-
TON FOR _____ COUNTY**

Plaintiff,

vs.

Defendant.

No. _____
**SPECIAL
VERDICT FORM**

**We, the jury, answer the questions submitted by the
court as follows:**

**[QUESTION 1: Did the defendant supply a product
that was not reasonably safe [in
construction at the time the product
left the defendant's control] [because
it did not conform to the
manufacturer's express warranty] [as
designed] [because adequate warnings
or instructions were not provided with
the product]?]**

**[QUESTION 1: Was the defendant negligent in that
the product was not reasonably safe
because adequate warnings or instruc-
tions were not provided after the prod-
uct was manufactured?]**

ANSWER: _____ (Write "yes" or "no")

(DIRECTION: If you answered "no" to Question 1, sign

this verdict form. If you answered "yes" to Question 1, answer Question 2.)

QUESTION 2: Was the unsafe condition of the product a proximate cause of injury or damage to the plaintiff?

ANSWER: _____ (Write "yes" or "no")

(DIRECTION: If you answered "no" to Question 2, sign this verdict form. If you answered "yes" to Question 2, answer Question 3.)

QUESTION 3: What do you find to be the plaintiff's amount of damages?

ANSWER:

[(a) Past Economic Damages	\$_____]
[(b) Future Economic Damages	\$_____]
[(c) Noneconomic Damages	\$_____]

(DIRECTION: Sign this verdict form and notify the bailiff.)

DATE: _____, _____
Presiding Juror

NOTE ON USE

This special verdict form is for use in product liability actions against a manufacturer in which there are no affirmative defenses and there are no other entities that have been identified as possibly being at fault for the plaintiff's damages.

Use bracketed material as applicable. Question 1 is set out in alternative form. The first option applies a strict liability standard. This option should be used if the product is claimed to be not reasonably safe in construction (WPI 110.01), not reasonably safe because it did not conform to the manufacturer's express warranty (WPI 110.01.01), not reasonably safe in design (WPI 110.02), or not reasonably safe because adequate warnings were not provided with the product (WPI 110.03).

The second option applies a negligence standard. The second option should only be used if it is claimed that the manufacturer was negligent in that the product was not reasonably safe because adequate warnings were not provided after the product was manufactured (WPI 110.03.01).

If there is a jury issue whether the defendant was a manufacturer as defined in RCW 7.72.010, insert the following as the first question in the verdict form.

QUESTION 1: Was the defendant a manufacturer?

ANSWER: _____ (Write “yes” or “no”)

(DIRECTION: If you answered “no” to Question 1, sign this verdict form. If you answered “yes” to Question 1, then answer Question 2.)

Use WPI 1.11 (Concluding Instruction—For Special Verdict Form) and WPI 30.01.01 (Measure of Economic and Noneconomic Damages—Personal Injury—No Contributory Negligence) with this verdict form.

If defenses are claimed under WPI 110.05 (Government Contract Specifications—Defense) or WPI 110.08 (Useful Safe Life), questions will need to be added to the verdict form covering these defenses.

For a personal injury case involving married co-plaintiffs, the verdict form and damage instruction should take into account the community property issues discussed in *Brown v. Brown*, 100 Wn.2d 729, 675 P.2d 1207 (1984). See the Comment to WPI 30.01.01 (Measure of Economic and Noneconomic Damages—Personal Injury—No Contributory Negligence).

COMMENT

RCW 7.72.010(6).

Recovery for “harm.” RCW 7.72.030(1) and (2) in general subject a manufacturer to liability for a claimant’s “harm” that is proximately caused by the manufacturer’s product. “Harm” is defined by RCW 7.72.010(6) as “includ[ing] any damages recognized by the courts of this state: PROVIDED, That the term ‘harm’ does not include direct or consequential economic loss under Title 62A RCW.” See *Bylsma v. Burger King Corp.*, 176 Wn.2d 555, 561–62, 293 P.3d 1168 (2013) (“The WPLA permits relief for emotional distress damages, in the absence of physical injury . . .”).

Economic damages. The Washington Supreme Court has devel-

oped a “risk of harm” analysis for determining whether the Washington Product Liability Act bars a claim for damages under the “direct or consequential economic loss” language of RCW 7.72.010(6). See the discussion of the economic loss rule (renamed as the independent duty doctrine) in the Introduction to this chapter, WPI 110.00.

Pain and suffering. In *Washington State Physicians Insurance Exchange v. Fisons Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993), a physician brought a failure-to-warn claim against a drug manufacturer. The physician sought recovery for the pain and suffering he experienced when the drug injured his patient. The court held that a physician’s pain and suffering due to a patient’s injury are not “damages recognized by the courts of this state” and therefore fail to meet the definition of “harm” under RCW 7.72.010(6). *Physicians Insurance*, 122 Wn.2d at 318–22.

Future damages. The verdict form has a separate line for future damages. If a verdict or award for future economic damages is at least one hundred thousand dollars, RCW 4.56.260 requires the court, at the request of a party, to enter a judgment providing for the periodic payment in whole or in part of the future economic damages.

[Current as of December 2020.]

WPI 110.30.02

**SPECIAL VERDICT FORM—PRODUCT
LIABILITY—NO AFFIRMATIVE DEFENSES—EMPTY
CHAIRS**

(Insert caption. See WPI 110.30.01.)

**We, the jury, answer the questions submitted by the
court as follows:**

**[QUESTION 1: Did the defendant supply a product that
was not reasonably safe [in construc-
tion at the time the product left the
defendant's control] [because it did not
conform to the manufacturer's express
warranty] [as designed] [because ade-
quate warnings or instructions were not
provided with the product]?]**

**[QUESTION 1: Was the defendant negligent in that the
product was not reasonably safe
because adequate warnings or instruc-
tions were not provided after the prod-
uct was manufactured?]**

ANSWER: _____ (Write "yes" or "no")

*(DIRECTION: If you answered "no" to Question 1,
sign and return this verdict. If you answered "yes" to Ques-
tion 1, answer Question 2.)*

**QUESTION 2: Was the unsafe condition of the prod-
uct a proximate cause of injury or dam-
age to the plaintiff?**

ANSWER: _____ (Write "yes" or "no")

(DIRECTION: If you answered "no" to Question 2, sign this verdict form. If you answered "yes" to Question 2, answer Question 3.)

QUESTION 3: Were any of the following negligent?

(DIRECTION: Answer "yes" or "no" after the name of each entity not party to this action.)

ANSWER:	Yes	No
Entity (name):	_____	_____
[Entity (name):	_____	_____]
[Entity (name):	_____	_____]

(DIRECTION: If you answered "no" to Question 3 as to each entity, skip Question 4 and answer Question 5. If you answered "yes" to Question 3 as to any entity, answer Question 4.)

QUESTION 4: Was such negligence a proximate cause of [injury] [damage] to the plaintiff?

(DIRECTION: Answer "yes" or "no" after the name of each entity found negligent by you in Question 3.)

ANSWER:	Yes	No
Entity (name):	_____	_____
[Entity (name):	_____	_____]
[Entity (name):	_____	_____]

(DIRECTION: Answer Question 5.)

QUESTION 5: What do you find to be the plaintiff's amount of damages?

ANSWER:

[(a) Past Economic Damages	\$_____]
[(b) Future Economic Damages	\$_____]
[(c) Noneconomic Damages	\$_____]

(DIRECTION: If you answered Question 5 with any amount of money and you answered "yes" as to any entity in Question 4, answer Question 6. Otherwise, sign this verdict form.)

QUESTION 6: Assume that 100% represents the total combined fault that proximately caused the plaintiff's [injury] [damage]. What percent of this 100% is attributable to the [unsafe condition of the defendant's product] [defendant's negligence] and what percentage of this 100% is attributable to each entity, if any, whose negligence was found by you in Question 4 to have been a proximate cause of the [injury] [damage] to the plaintiff? Your total must equal 100%.

ANSWER:	Percentage
To defendant's [product]	_____%
[negligence]:	
To Entity (name):	_____%
[To Entity (name):	_____%]
[To Entity (name):	_____%]
TOTAL	100%

(DIRECTION: Sign this verdict form and notify the bailiff.)

DATE: _____,

Presiding Juror

NOTE ON USE

This special verdict form is for use in product liability actions against a manufacturer in which there are no affirmative defenses and

there are other entities that have been identified as possibly being at fault for the plaintiff's damages.

Use bracketed material as applicable. Question 1 is set out in alternative form. The first option applies a strict liability standard. This option should be used if the product is claimed to be not reasonably safe in construction (WPI 110.01), not reasonably safe because it did not conform to the manufacturer's express warranty (WPI 110.01.01), not reasonably safe in design (WPI 110.02), or not reasonably safe because adequate warnings were not provided with the product (WPI 110.03). The second option applies a negligence standard. The second option should only be used if it is claimed that the manufacturer was negligent in that the product was not reasonably safe because adequate warnings were not provided after the product was manufactured (WPI 110.03.01).

If there is a jury issue whether the defendant was a manufacturer as defined in RCW 7.72.010, insert the following as the first question in the verdict form.

QUESTION 1: Was the defendant a manufacturer?

ANSWER: _____ (Write "yes" or "no")

(DIRECTION: If you answered "no" to Question 1, sign this verdict form. If you answered "yes" to Question 1, then answer Question 2.)

Use WPI 1.11 (Concluding Instruction—For Special Verdict Form) and WPI 30.01.01 (Measure of Economic and Noneconomic Damages—Personal Injury—No Contributory Negligence) with this verdict form.

If defenses are claimed under WPI 110.05 (Government Contract Specifications—Defense) or WPI 110.08 (Useful Safe Life), a question will need to be added to the verdict form covering these defenses.

Use WPI 41.04 (Damages to be Apportioned), WPI 21.10 (Burden of Proof—Entities Not Party to the Action), and WPI 10.01 (Negligence—Adult—Definition) with this verdict form.

For a personal injury case involving married co-plaintiffs, the verdict form and damage instruction should take into account the community property issues discussed in *Brown v. Brown*, 100 Wn.2d 729, 675 P.2d 1207 (1984). See the Comment to WPI 30.01.01 (Measure of Economic and Noneconomic Damages—Personal Injury—No Contributory Negligence).

COMMENT

RCW 4.22.070.

The statute requires the apportionment of damages “in all actions involving fault of more than one entity.” Pursuant to RCW 7.22.070(1), the trier of fact shall determine the percentage of the total fault that is attributable to every entity that caused the plaintiff’s damages. Entities include the plaintiff or person suffering personal injury or incurring property damage, defendants, third-party defendants, entities released by the plaintiff, entities immune from liability to the plaintiff, and entities with any other individual defense against the plaintiff. Judgment is then entered against each defendant (unless a defendant is immune from liability or has prevailed on an individual defense), in an amount that represents the defendant’s proportionate share of the plaintiff’s total damages. The liability of each defendant is several unless one of the exceptions outlined in the statute apply.

The definition of fault found in RCW 4.22.015 applies when apportioning total fault pursuant to RCW 4.22.070. *Welch v. Southland Corp.*, 134 Wn.2d 629, 952 P.2d 162 (1998); see also *Hiner v. Bridgestone/Firestone, Inc.*, 138 Wn.2d 248, 259–62, 978 P.2d 505 (1999) (discussing the interplay of RCW 4.22.015 and 4.22.070); *Coulter v. Asten Grp., Inc.*, 135 Wn.App. 613, 146 P.3d 444 (2006) (special verdict form for apportionment in product liability case upheld on appeal). The word “fault,” as defined by RCW 4.22.015, “includes acts or omissions, including the misuse of a product, that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability or liability on a product liability claim.” The term also includes breach of warranty.

The theory of strict product liability is to insure that the cost of injury resulting from a defective product is borne by the manufacturer that placed the product on the market rather than by the person injured. See *Greenman v. Yuba Power Prods., Inc.*, 59 Cal.2d 57, 27 Cal.Rptr. 697, 377 P.2d 897 (Cal. 1963); Restatement (Second) of Torts § 402A cmt. c (1965). RCW 4.22.070 modifies this theory by shifting to the injured party the cost of injury apportionable to entities other than the manufacturer. If the injured consumer is entirely without fault, RCW 4.22.070(1)(b) retains a limited form of joint and several liability by providing that “the defendants against whom the judgment is entered shall be jointly and severally liable for the sum of their proportionate shares of the claimant’s total damages.” But even under RCW 4.22.070(1)(b), the injured party will bear the costs that are attributable to “empty chairs.” For additional commentary concerning RCW 4.22.070, see WPI 21.10 (Burden of Proof—Entities Not Party to the Action) and WPI 41.04 (Damages To Be Apportioned).

For a discussion of the damages recoverable in product liability actions, see the Comment to WPI 110.30.01 (Special Verdict Form—Product Liability—No Affirmative Defenses—No Empty Chairs).

[Current as of December 2020.]

WPI 110.31.01

**SPECIAL VERDICT FORM—PRODUCT LIABILITY—
ASSUMPTION OF RISK—CONTRIBUTORY
NEGLIGENCE—NO EMPTY CHAIRS**

(Insert caption. See WPI 110.30.01.)

We, the jury, answer the questions submitted by the court as follows:

[QUESTION 1: Did the defendant supply a product that was not reasonably safe [in construction at the time the product left the defendant's control] [because it did not conform to the manufacturer's express warranty] [as designed] [because adequate warnings or instructions were not provided with the product]?]

[QUESTION 1: Was the defendant negligent in that the product was not reasonably safe because adequate warnings or instructions were not provided after the product was manufactured?]

ANSWER: _____ (Write "yes" or "no")

(DIRECTION: If you answered "no" to Question 1, sign this verdict form. If you answered "yes" to Question 1, answer Question 2.)

QUESTION 2: Was the unsafe condition of the product a proximate cause of injury or damage to the plaintiff?

ANSWER: _____ (Write "yes" or "no")

(DIRECTION: If you answered "no" to Question 2, sign this verdict form. If you answered "yes" to Question 2, answer Question 3.)

QUESTION 3: What do you find to be the plaintiff's amount of damages? (Do not consider the issue[s] of [assumption of risk] [or] [contributory negligence], if any, in your findings.)

ANSWER: _____

- [(a) Past Economic Damages \$ _____]
[(b) Future Economic Damages \$ _____]
[(c) Noneconomic Damages \$ _____]

(DIRECTION: If you answered Question 3 with any amount of money, answer Question 4. If you find no damages, sign this verdict form.)

QUESTION 4: [Did the plaintiff assume the risk of injury or damage from the product] [or] [was the plaintiff also negligent?]

ANSWER: _____ (Write "yes" or "no")

(DIRECTION: If you answered "no" to Question 4, sign this verdict form. If you answered "yes" to Question 4, answer Question 5.)

QUESTION 5: Was the plaintiff's [assumption of risk] [or] [negligence] a proximate cause of the [injury] [damage] to the plaintiff?

ANSWER: _____ (Write "yes" or "no")

(DIRECTION: If you answered "no" to Question 5, sign this verdict form. If you answered "yes" to Question 5, answer Question 6.)

QUESTION 6: Assume that 100% represents the total combined fault that proximately caused the plaintiff's [injury] [damage]. What percent of this 100% is attributable to the [unsafe condition of the defendant's product] [defendant's negligence], and what percentage of this 100% is attributable to the plaintiff's [assumption of risk] [and] [negligence]? Your total must equal 100%.

ANSWER:	<u>Percentage</u>
To defendant's [product]	_____ %
[negligence]:	
To plaintiff (name):	_____ %
TOTAL:	100%

(DIRECTION: Sign and return this verdict.)

DATE: _____, 20____

Presiding Juror

NOTE ON USE

This special verdict form is for use in product liability actions against a manufacturer if assumption of risk or contributory negligence is in issue and there are no other entities that have been identified as possibly being at fault for the plaintiff's damages.

Use bracketed material as applicable. Question 1 is set out in alternative form. The first option applies a strict liability standard. This option should be used if the product is claimed to be not reasonably safe in construction (WPI 110.01), not reasonably safe because it did not conform to the manufacturer's express warranty (WPI 110.01.01), not reasonably safe in design (WPI 110.02), or not reasonably safe because adequate warnings were not provided with the product (WPI 110.03). The second option applies a negligence standard. The second option should only be used if it is claimed that the manufacturer was negligent in that the product was not reasonably safe because adequate warnings were not provided after the product was manufactured (WPI 110.03.01).

If there is a jury issue whether the defendant was a manufacturer as defined in RCW 7.72.010, insert the following as the first question in the verdict form.

QUESTION 1: Was the defendant a manufacturer?**ANSWER:** _____ (Write “yes” or “no”)

(DIRECTION: If you answered “no” to Question 1, sign this verdict form. If you answered “yes” to Question 1, answer Question 2.)

Use WPI 1.11 (Concluding Instruction—For Special Verdict Form) and WPI 30.02.01 (Measure of Economic and Noneconomic Damages—Personal Injury—Contributory Negligence) with this verdict form. If assumption of risk is at issue, WPI 30.02.01 should be modified to refer to assumption of risk.

If defenses are claimed under WPI 110.05 (Government Contract Specifications—Defense) or WPI 110.08 (Useful Safe Life), a question will need to be added to the verdict form covering these defenses.

For a personal injury case involving married co-plaintiffs, the verdict form and damage instruction should take into account the community property issues discussed in *Brown v. Brown*, 100 Wn.2d 729, 675 P.2d 1207 (1984). See the Comment to WPI 30.01.01 (Measure of Economic and Noneconomic Damages—Personal Injury—No Contributory Negligence).

COMMENT

RCW 4.22.005, RCW 4.22.015, and RCW 4.56.250.

For a discussion of RCW 4.22.005 and RCW 4.22.015, see the Comment accompanying WPI 110.10 (Assumption of Risk—Contributory Negligence). For a discussion of the damages recoverable in product liability actions, see the Comment to WPI 110.30.01 (Special Verdict Form—Product Liability—No Affirmative Defenses—No Empty Chairs).

[Current as of December 2020.]

WPI 110.31.01.01

**SPECIAL VERDICT FORM—PRODUCT LIABILITY—
ASSUMPTION OF RISK—CONTRIBUTORY
NEGLIGENCE—NO EMPTY CHAIRS—MIXED
STANDARDS OF CARE**

(Insert caption. See WPI 110.30.01.)

We, the jury, answer the questions submitted by the court as follows:

[QUESTION 1: Did the defendant supply a product that was not reasonably safe [in construction at the time the product left the defendant's control] [because it did not conform to the manufacturer's express warranty] [as designed] [because adequate warnings or instructions were not provided with the product]?]

[QUESTION 1: Was the defendant negligent in that the product was not reasonably safe because adequate warnings or instructions were not provided after the product was manufactured?]

ANSWER: _____ (Write "yes" or "no")

(DIRECTION: If you answered "no" to Question 1, sign this verdict form. If you answered "yes" to Question 1, answer Question 2.)

QUESTION 2: Was the not reasonably safe condition of the product a proximate cause of injury or damage to the plaintiff?

ANSWER: _____ (Write "yes" or "no")

(DIRECTION: If you answered "no" to Question 2, sign this verdict form. If you answered "yes" to Question 2, answer Question 3.)

QUESTION 3: What do you find to be the plaintiff's amount of damages? (Do not consider the issue[s] of [assumption of risk] [or] [contributory negligence], if any, in your findings.)

ANSWER:

[(a) Past Economic Damages	\$ _____]
[(b) Future Economic Damages	\$ _____]
[(c) Noneconomic Damages	\$ _____]

(DIRECTION: If you answered Question 3 with any amount of money, answer Question 4. If you find no damages, sign this verdict form.)

QUESTION 4: [Did the plaintiff assume the risk of injury or damage from the product] [or] [was the plaintiff [also] negligent] [or] [did the plaintiff negligently misuse the product]?

ANSWER: _____ (Write "yes" or "no")

(DIRECTION: If you answered "no" to Question 4, sign this verdict form. If you answered "yes" to Question 4, answer Question 5.)

QUESTION 5: Was the plaintiff's [negligence] or [negligent misuse of the product] [or] [assumption of risk] a proximate cause of the [injury] [damage] to the plaintiff?

ANSWER: _____ (Write "yes" or "no")

(DIRECTION: If you answered "no" to Question 5, sign this verdict form. If you answered "yes" to Question 5, answer Question 6.)

QUESTION 6: "Total combined fault" includes all of the forms of fault, based on your answers to the previous questions, that you found proximately caused the plaintiff's [injury] [damage]. Assume that 100% represents the total combined fault that proximately caused the plaintiff's [injury] [damage]. What percent of this 100% is attributable to each of the following parties? Your total must equal 100%.

ANSWER:	<u>Percentage</u>
To Defendant	_____ %
To Plaintiff	_____ %
TOTAL:	100%

(DIRECTION: Sign and return this verdict.)

DATE: _____,

Presiding Juror

NOTE ON USE

This special verdict form should be used if the case involves different types of fault and the jury would benefit from having a common term to use in apportioning fault. Although RCW Chapter 4.22 applies to all actions in which comparative fault is at issue, ordinarily it is unnecessary to use the term "fault" or define it because most cases involve a comparison by the jury of the same type of fault - typically negligence.

Product liability. The most common use for this instruction will be in product liability actions against a manufacturer that involve issues of misuse of the product, contributory negligence, assumption of risk, or the fault of a third party.

WPI 110.31.01.02 (Fault To Be Apportioned—Product Liability) connects with this instruction, to give the jury guidance on what types of fault constitute "total fault", and how "total fault" leads to the ap-

portionment question—number 6 in this example—in the special verdict form instruction.

Use bracketed material as applicable. Question 1 is set out in alternative form. The first option applies a strict liability standard. This option should be used if the product is claimed to be not reasonably safe in construction (WPI 110.01), not reasonably safe because it did not conform to the manufacturer's express warranty (WPI 110.01.01), not reasonably safe in design (WPI 110.02), or not reasonably safe because adequate warnings were not provided with the product (WPI 110.03). The second option applies a negligence standard. The second option should only be used if it is claimed that the manufacturer was negligent in that the product was not reasonably safe because adequate warnings were not provided after the product was manufactured (WPI 110.03.01).

If there is a jury issue whether the defendant was a manufacturer as defined in RCW 7.72.010, insert the following as the first question in the verdict form:

QUESTION 1: Was the defendant a manufacturer?

ANSWER: _____ (Write "yes" or "no")

(DIRECTION: If you answered "no" to Question 1, sign this verdict form. If you answered "yes" to Question 1, answer Question 2.)

Use WPI 1.11 (Concluding Instruction—For Special Verdict Form) and WPI 30.02.01 (Measure of Economic and Noneconomic Damages—Personal Injury—Contributory Negligence) with this verdict form. If assumption of risk is at issue, WPI 30.02.01 should be modified to refer to assumption of risk.

If defenses are claimed under WPI 110.05 (Government Contract Specifications—Defense) or WPI 110.08 (Useful Safe Life), a question will need to be added to the verdict form covering these defenses.

Cases other than product liability. Another example of how this verdict form might be used is in a case involving a claim for strict liability based on an abnormally dangerous activity, when the defendant alleges that the plaintiff was contributorily negligent. In such a case, the initial questions regarding the liability of the defendant will need to reflect the appropriate theory. Alternatively, if the issue of strict liability has been decided as a matter of law, the verdict form will omit the question of the defendant's liability, and even the question regarding proximate cause if that has also been determined as a matter of law, but will retain the apportionment process in Question 6.

Married co-plaintiffs. For a personal injury case involving married co-plaintiffs, the verdict form and damage instruction should take into account the community property issues. See the Comment to WPI 30.01.01 (Measure of Economic and Noneconomic Damages—Personal Injury—No Contributory Negligence).

Multiple defendants. The verdict form is based upon a single defendant who is claimed to be strictly liable for the plaintiff's injury, while the defendant alleges that the plaintiff is also at fault. The verdict form can be adapted to include multiple defendants. If one defendant is subject to strict liability and another defendant is alleged to have been at fault on some other basis, the verdict form will need additional questions regarding that defendant's fault (typically, whether the additional defendant was negligent, and whether it proximately caused the injury) and an additional line added to Question 6 that will permit the jury to apportion fault to that party. Even if the plaintiff is not alleged to be at fault in causing the injury, this form may be needed if claims are made against more than one defendant and the types of fault are dissimilar.

“Empty chairs.” If one of the parties alleges that a non-party entity (the so-called “empty chair”) was also at fault and claims that fault should be apportioned accordingly, the verdict form may be modified to add additional questions and additional line(s) to the percentage allocation in Question 6.

COMMENT

RCW 4.22.005; RCW 4.22.015; RCW 4.56.250.

This verdict form was added in 2012.

See the Comment to WPI 41.04 (Fault to Be Apportioned) for general guidance regarding the history of RCW 4.22.070 and the apportionment of fault.

For a discussion of RCW 4.22.005 and RCW 4.22.015, see the Comment accompanying WPI 110.10 (Assumption of Risk—Contributory Negligence). For a discussion of the damages recoverable in product liability actions, see the Comment to WPI 110.30.01 (Special Verdict Form—Product Liability—No Affirmative Defenses—No Empty Chairs).

In order to modify this verdict form for use in cases in which the cause of action and evidence involves less common types of fault (not listed in this instruction or in WPI 110.31.01.02 (Fault to be Apportioned—Product Liability)), the court should specify the less common type of fault, in the relevant questions posed. The court would also

modify the connecting instruction, WPI 110.31.01.02 (Fault To Be Apportioned—Product Liability), to include the less common type of fault. See the bracketed blank line in WPI 110.31.01.02 (Fault to be Apportioned—Product Liability), which describes the concept of “total combined fault.”

As the court recognized in *Coulter v. Asten Group*, 135 Wn.App. 613, 622–23, 626–27, 146 P.3d 444 (2006), the jury apportions fault, and the court applies the law and mathematical proportions to allocate damages. Choosing types of fault to insert in the jury instructions depends on legal standards and evidence concerning specific acts and omissions of the entities involved in the causes of action. See RCW 4.22.015; *Hiner v. Bridgestone/Firestone, Inc.*, 138 Wn.2d 248, 259–62, 978 P.2d 505 (1999); *Johnson v. Recreational Equip., Inc.*, 159 Wn.App. 939, 946–54, 247 P.3d 18 (2011). This verdict form guides the jury as it considers allocation of fault; the court resolves the issues of law. See *Coulter*, 135 Wn.App. 613.

[Current as of December 2020.]

WPI 110.31.01.02**FAULT TO BE APPORTIONED—PRODUCT
LIABILITY**

If you find that more than one entity was at fault, you must determine what percentage of the total fault is attributable to each entity that proximately caused the [injury] [damage] to the plaintiff. Your answers to the questions in the special verdict form will furnish the basis by which the court will apportion damages, if any.

Entities may include the defendant(s), [the plaintiff(s)] [and] [the person(s) incurring property damage] [third-party defendant(s)] [entity or entities not party to this action].

This instruction defines “fault” as it is used in the special verdict form. You will need to apportion fault only if you first determine that the defendant supplied a product that [was not reasonably safe as designed] [or] [was not reasonably safe in construction] [or] [was not accompanied by adequate warnings] and that this unsafe aspect of the product proximately caused the plaintiff’s injury. In addition, you will only need to apportion fault if you also determine that [the plaintiff] [another party] [another entity] was also at fault and that such fault also caused the plaintiff’s injury.

Each of the following is considered “fault”:

[supplying a product that is not reasonably safe because of inadequate warnings]

[supplying a product that is not reasonably safe in its design]

[supplying a product that is not reasonably safe in its construction]

[defendant's negligence]

[plaintiff's negligence]

[breach of warranty]

[negligent misuse of product]

[assumption of risk]

[(other — see Note on Use)].

NOTE ON USE

Use this instruction to accompany WPI 110.31.01.01 (Special Verdict Form—Product Liability—Assumption of Risk—Contributory Negligence—No Empty Chairs—Mixed Standards of Care) if there is a need to explain how to apportion fault when there are different types of fault. It is only necessary to use WPI 110.31.01.01 (Special Verdict Form—Product Liability—Assumption of Risk—Contributory Negligence—No Empty Chairs—Mixed Standards of Care) and this instruction when the jury is required to apportion fault between an “apple” (such as strict liability) and an “orange” (such as contributory negligence or the negligence of a third party). If the comparison of fault does not involve different types of fault, this instruction should not be used.

Although RCW 4.22.015 includes failure to mitigate damages within the definition of “fault,” this instruction does not include it for purposes of apportionment. Instead, if failure to mitigate is alleged by a defendant, the verdict form should instruct the jury to reduce the amount of the plaintiff's damages by whatever amount of such damage is attributed to the failure to mitigate. The apportionment of fault is then applied to the amount of damages specified in the jury's answer on the verdict form.

The forms of fault listed in the instruction should include only those that are at issue in the case. The instruction lists in brackets the types of fault more commonly at issue in a product liability case. If the case involves a form of fault that is less common and not already listed, the instruction (and the verdict form) should be modified to include it (as indicated with the bracketed blank line in this pattern instruction).

This instruction can also be modified for use in a case that involves other types of “apples and oranges” comparison, such as contributory negligence and an abnormally dangerous activity subject to strict liability.

Use WPI 11.01 (Contributory Negligence—Definition) if contributory fault is an issue in the case. See also WPI 13.03 (Assumption of Risk—Implied Primary) and WPI 13.04 (Assumption of Risk—Express) concerning assumption of risk.

If appropriate, use an instruction on failure to mitigate: WPI 33.01 (Avoidable Consequences—Personal Injury Generally), WPI 33.02 (Avoidable Consequences—Failure to Secure), or WPI 33.03 (Avoidable Consequences—Property or Business).

COMMENT

See the Comment to WPI 41.04 (Fault to be Apportioned) for general guidance regarding the history of RCW 4.22.070 and the apportionment of fault.

The special verdict forms for product liability cases, WPI 110.30.02, WPI 110.31.01, and WPI 110.31.02, may be adapted to fit the specific cause of action and evidence concerning acts and omissions, proximate cause and damages, as appropriate. The special verdict forms for product liability cases, WPI 110.30.02 (Special Verdict Form—Product Liability—No Affirmative Defenses—Empty Chairs), WPI 110.31.01 (Special Verdict Form—Product Liability—Assumption of Risk—Contributory Negligence—No Empty Chairs), and WPI 110.31.02 (Special Verdict Form—Product Liability—Assumption of Risk—Contributory Negligence—Empty Chairs), may be adapted to fit the specific cause of action and evidence concerning acts and omissions, proximate cause and damages, as appropriate. The WPI Committee has provided an example, WPI 110.31.01.01 (Special Verdict Form—Product Liability—Assumption of Risk—Contributory Negligence—No Empty Chairs—Mixed Standards of Care), but this is not a catch-all special verdict form. The trial court and counsel will need to take care in structuring the special verdict form to accurately reflect the legal principles, causes of action, entities, and evidence in the particular case. See generally *Johnson v. Recreational Equip., Inc.*, 159 Wn.App. 939, 946–54, 247 P.3d 18 (2011); *Coulter v. Asten Grp.*, 135 Wn.App. 613, 622–23, 626–27, 146 P.3d 444 (2006).

[Current as of December 2020.]

WPI 110.31.02

**SPECIAL VERDICT FORM—PRODUCT LIABILITY—
ASSUMPTION OF RISK—CONTRIBUTORY
NEGLIGENCE—EMPTY CHAIRS**

(Insert caption. See WPI 110.30.01.)

We, the jury, answer the questions submitted by the court as follows:

[QUESTION 1: Did the defendant supply a product that was not reasonably safe [in construction at the time the product left the defendant's control] [because it did not conform to the manufacturer's express warranty] [as designed] [because adequate warnings or instructions were not provided with the product]?]

[QUESTION 1: Was the defendant negligent in that the product was not reasonably safe because adequate warnings or instructions were not provided after the product was manufactured?]

ANSWER: _____ (Write "yes" or "no")

(DIRECTION: If you answered "no" to Question 1, sign this verdict form. If you answered "yes" to Question 1, answer Question 2.)

QUESTION 2: Was the unsafe condition of the product a proximate cause of injury or damage to the plaintiff?

ANSWER: _____ (Write "yes" or "no")

(DIRECTION: If you answered "no" to Question 2, sign this verdict form. If you answered "yes" to Question 2, answer Question 3.)

QUESTION 3: Were any of the following negligent?

(DIRECTION: Answer "yes" or "no" after the name of each entity not party to this action.)

ANSWER:	Yes	No
Entity (name):	_____	_____
[Entity (name):	_____	_____]
[Entity (name):	_____	_____]

(DIRECTION: If you answered "no" to Question 3 as to each entity, skip Question 4 and answer Question 5. If you answered "yes" to Question 3 as to any entity, answer Question 4.)

QUESTION 4: Was such negligence a proximate cause of [injury] [damage] to the plaintiff?

(DIRECTION: Answer "yes" or "no" after the name of each entity found negligent by you in Question 3.)

ANSWER:	Yes	No
Entity (name):	_____	_____
[Entity (name):	_____	_____]
[Entity (name):	_____	_____]

(DIRECTION: Answer Question 5.)

QUESTION 5: What do you find to be the plaintiff's amount of damages? (Do not consider the issue[s] of [assumption of risk] [or] [contributory negligence], if any, in your findings.)

ANSWER: _____

- [(a) Past Economic Damages \$ _____]
- [(b) Future Economic Damages \$ _____]
- [(c) Noneconomic Damages \$ _____]

(DIRECTION: If you answered Question 5 with any amount of money and if you answered Question 4 "yes" as to any entity, answer Question 6. Otherwise, sign this verdict form.)

QUESTION 6: [Did the plaintiff assume the risk of injury or damage from the product] [or] [was the plaintiff also negligent]?

ANSWER: _____ (Write "yes" or "no")

(DIRECTION: If you answered "no" to Question 6, skip Question 7 and answer Question 8. If you answered "yes" to Question 6, answer Question 7.)

QUESTION 7: Was the plaintiff's [assumption of risk] [or] [negligence] a proximate cause of injury or damage to the plaintiff?

ANSWER: _____ (Write "yes" or "no")

(DIRECTION: If you answered "no" to Question 7, answer Question 8. If you answered "yes" to Question 7, answer Question 9.)

QUESTION 8: Assume that 100% represents the total combined fault that proximately caused the plaintiff's [injury] [damage]. What percentage of this 100% is attributable to the [unsafe condition of the defendant's product] [defendant's negligence] and what percentage of this 100% is attributable to each entity, if any, whose negligence was found by you in Question 4 to have been a proximate cause of the [injury] [damage] to the plaintiff? Your total must equal 100%.

ANSWER:

Percentage

To defendant's [product] [negligence]: _____%

To Entity (name): _____%

[To Entity (name): _____%]

[To Entity (name): _____%]

TOTAL: _____ 100%

(DIRECTION: Sign this verdict form.)

QUESTION 9: Assume that 100% represents the total combined fault that proximately caused the plaintiff's [injury] [damage]. What percentage of this 100% is attributable to the [unsafe condition of the defendant's product] [defendant's negligence]; what percentage of this 100% is attributable to each entity, if any, whose negligence was found by you in Question 4 to have been a proximate cause of the [injury] [damage] to the plaintiff; and what percentage of this 100% is attributable to the plaintiff's [assumption of risk] [and] [negligence]? Your total must equal 100%.

ANSWER:	<u>Percentage</u>
To defendant's [product] [negligence]:	_____ %
To Entity (name):	_____ %
[To Entity (name):	_____ %]
[To Entity (name):	_____ %]
To plaintiff (name):	_____ %
TOTAL:	100%

(DIRECTION: Sign this verdict form and notify the bailiff.)

DATE: _____, _____
Presiding Juror

NOTE ON USE

This special verdict form is for use in product liability actions against a manufacturer if assumption of risk or contributory negligence is in issue and there are other entities that have been identified as possibly being at fault for the plaintiff's damages.

Use bracketed material as applicable. Question 1 is set out in alternative form. The first option applies a strict liability standard. This option should be used if the product is claimed to be not reasonably safe in construction (WPI 110.01), not reasonably safe because it did not conform to the manufacturer's express warranty (WPI 110.01.01), not reasonably safe in design (WPI 110.02), or not reasonably safe because adequate warnings were not provided with the product (WPI 110.03). The second option applies a negligence standard. The second option should only be used if it is claimed that the manufacturer was negligent in that the product was not reasonably safe because adequate warnings were not provided after the product was manufactured (WPI 110.03.01).

If there is a jury issue whether the defendant was a manufacturer as defined in RCW 7.72.010, insert the following as the first question in the verdict form.

QUESTION 1: Was the defendant a manufacturer?

ANSWER: _____ (Write "yes" or "no")

(DIRECTION: If you answered "no" to Question 1, sign this verdict form. If you answered "yes" to Question 1, answer Question 2.)

Use WPI 1.11 (Concluding Instruction—For Special Verdict Form) and WPI 30.02.01 (Measure of Economic and Noneconomic Damages—Personal Injury—Contributory Negligence) with this verdict form. If assumption of risk is at issue, WPI 30.02.01 (Measure of Economic and Noneconomic Damages—Personal Injury—Contributory Negligence) should be modified to refer to assumption of risk.

If defenses are claimed under WPI 110.05 (Government Contract Specifications—Defense) or WPI 110.08 (Useful Safe Life), questions will need to be added to the verdict form covering these defenses.

Use WPI 41.04 (Damages to be Apportioned), WPI 21.10 (Burden of Proof—Entities Not Party to the Action), and WPI 10.01 (Negligence—Adult—Definition) with this verdict form.

COMMENT

RCW 4.22.005, RCW 4.22.015, RCW 4.56.250, and RCW 4.22.070.

For a discussion of RCW 4.22.005 and RCW 4.22.015, see the Comment accompanying WPI 110.10 (Assumption of Risk—Contributory Negligence). For a discussion of the damages recoverable in product liability actions, see the Comment to WPI 110.30.01 (Special Verdict Form—Product Liability—No Affirmative Defenses—No Empty Chairs).

For a discussion of RCW 4.22.070 as it relates to product liability actions, see the Comment to WPI 110.30.02 (Special Verdict Form—Product Liability—No Affirmative Defenses—Empty Chairs).

In 2012, Question 9 was reorganized to more closely follow the jury's natural order of consideration (beginning with the defendant's percentage instead of the plaintiff's).

[Current as of December 2020.]

43012484

